

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

IN RE NATIONAL FOOTBALL) No. 2:12-md-02323-AB
LEAGUE PLAYERS' CONCUSSION)
INJURY LITIGATION) MDL No. 2323

_____) Philadelphia, PA
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FAIRNESS HEARING/AMENDED TRANSCRIPT
BEFORE THE HONORABLE ANITA B. BRODY

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1 P R O C E E D I N G S

2 (Call to Court)

3 THE CLERK: Now in session. The
4 Honorable Anita B. Brody presiding. Good morning,
5 Your Honor.

6 THE COURT: Good morning.

7 (A chorus of good morning)

8 THE COURT: Won't you be seated.

9 We're here in the case of NFL Players
10 Concussion Litigation, multi-district litigation
11 number 12-23-23.

12 And there are a few things that I want
13 to take care of before we -- before we begin. I want
14 to introduce Mr. Perry Golkin. Why don't you stand,
15 Mr. Golkin, who is my special master for financial
16 matters, and he has been just invaluable, and I want
17 to publicly thank you, Perry, you're been wonderful.

18 And if I decide to approve this
19 settlement and grant the motion I want to introduce
20 two people that I have designated for -- thank you --
21 two people that I have -- will be designating for
22 special master's implementation of the agreement.

23 And first, Dean Wendell Prichett, why
24 don't you stand -- Dean Prichett who is the -- are
25 you the interim dean, isn't that correct, at the

1 University of Pennsylvania Law School, and he's a
2 professor of law. Thank you.

3 And also Jo-Ann Verrier who will cover
4 the administrative matters. Jo -- full disclosure.
5 Jo-Ann was a law clerk of mine 30 years ago and she is
6 now vice dean of -- for administration at the
7 University of Pennsylvania law School. Thank you.

8 And Judge Strawbridge who is my
9 magistrate judge. And any time the agreement says
10 that it will be -- the Court will adjudicate the
11 matter it may be me or it may be Judge Strawbridge.
12 Thank you, David, I appreciate that.

13 Okay. Let's begin. Mr. Seeger.

14 MR. SEEGER: Yes, Your Honor.

15 Your Honor, if you don't mind I'm going
16 use this podium for a few minutes and then switch over
17 to this one.

18 THE COURT: Oh, wow. Okay. I'm glad I
19 have four of those podiums.

20 MR. SEEGER: I don't want to mess up --
21 I don't want to mess up the technology here.

22 THE COURT: All right. Okay.

23 MR. SEEGER: Good morning, Your Honor.

24 THE COURT: Good morning, Mr. Seeger.

25 MR. SEEGER: Thank you for this

1 opportunity.

2 I'd like to start by just introducing
3 if you don't mind, Your Honor, a few people that are
4 in the courtroom.

5 THE COURT: Oh, certainly.

6 MR. SEEGER: Chea (ph) Smith is with
7 us. She's the wife of Steve Smith, retired NFL
8 player, who's too sick to be here today, he's
9 suffering from ALS.

10 THE COURT: Okay.

11 MR. SEEGER: Also with us is our class
12 representative --

13 THE COURT: You know I think that the
14 -- if you use the microphone everybody can hear a
15 little -- yeah, that's better.

16 MR. SEEGER: I'll do that.

17 THE COURT: Yeah.

18 MR. SEEGER: Thank you, Mrs. Smith.

19 Also with us is Shawn Wooden, who's our
20 subclass representative, retired NFL player as well,
21 for Subclass I.

22 Our subclass representative, Kevin
23 Turner, for Subclass II could not make it. His
24 condition has deteriorated to the point where he is
25 now on a breathing -- he needs assistance with his

1 breathing and he's got a feeding tube, so his medical
2 professionals didn't think it would be appropriate for
3 him to travel, but he did want to be here and he
4 wanted me to mention that.

5 THE COURT: Okay.

6 MR. SEEGER: So thank you, Your Honor.

7 Also with me is our counsel I should
8 note. Co-lead counsel, Saul Weiss is here, Your
9 Honor.

10 MR. WEISS: Good morning, Your Honor.

11 THE COURT: Good morning.

12 MR. SEEGER: Also some members of the
13 negotiating team in the PEC, Gene Locks (ph) is here.

14 THE COURT: Hi.

15 MR. SEEGER: Steve Marks (ph). And
16 subclass counsel Arnold Levin (ph) and Diane Nest
17 (ph).

18 MR. MARKS: Good morning, Your Honor.

19 THE COURT: Good morning.

20 MR. SEEGER: And, Judge, before I start
21 I would like to just spend a moment to thank Your
22 Honor for everything you've done in this case. The
23 way you've handled it, the way you've managed it, and
24 at times the parties, as you know, this was a tough
25 fought litigation as well as a negotiation, and we

1 needed a kick in the pants at times and we got that
2 from Your Honor, and I want to thank you.

3 THE COURT: I never -- I never withhold
4 that.

5 (Laughter)

6 MR. SEEGER: And at times when it got
7 difficult we came to Your Honor and we asked for help.
8 And one of the things we asked you for is to appoint
9 Judge Lane Phillips to help us out, and you did that,
10 Your Honor, and he helped us get at least to the first
11 point that we got to.

12 And at that point Your Honor had some
13 questions about the deal and you needed those
14 responded to and studies, and you appointed Special
15 Master Golkin. And I want to thank Special Master
16 Golkin as well for the work he did in this case and
17 Your Honor for appointing him.

18 Judge, we're here today seeking final
19 approval of this landmark and historic settlement. I
20 say landmark because this settlement uses state of the
21 art diagnostic tools and tests that will assist in the
22 diagnosis, treatment, and prevention of diseases
23 associated with mild traumatic brain injury,
24 concussions, and sub-concussive hits.

25 There are numerous studies that

1 indicate the importance of early detection and
2 treatment and prevention in staving off some of the
3 serious conditions from a degenerative brain disease
4 like -- that are dealt with in this litigation, not to
5 mention the fact that the information that'll be
6 generated through our baseline assessment program will
7 be very important for science and scientists and
8 doctors who study this disease and try to come up with
9 answers to some of the things we don't -- answers that
10 we don't have today.

11 I also refer to this settlement as
12 historic because 5,000 brave NFL players put their
13 name and reputations on the line and took on the NFL
14 in what everyone understood would be a long and hard
15 fought battle. Those men, their wives, and their
16 families made this happen. They achieved something
17 that no one two years ago thought was possible could
18 be achieved, something that no one before was able to
19 achieve. They want an outstanding results for all NFL
20 retired NFL players whether they are vested union
21 members or not.

22 The settlement I'm about to discuss
23 gets immediate help to retired NFL players like Kevin
24 Turner suffering from a debilitating disease like ALS,
25 it helps those with Alzheimer, dementia, and

1 Parkinson's. No retired NFL player needs to prove he
2 sustained a concussion or prove causation in this
3 settlement. He only need be a retired NFL player.

4 All retired NFL players will have the
5 ability to get tested by a competent medical
6 professional located where they live.

7 Before I go into the details about the
8 benefits provided in the settlement I'd like to set
9 the stage for the settlement discussions.

10 This groundbreaking resolution is the
11 result of many months of intense, hard fought, arms
12 length negotiations. I have extensive experience in
13 trying individual cases, mass cases, class cases
14 involving personal injuries. I've personally
15 negotiated over \$8 billion in settlements for victims
16 suffering from personal injuries in pharmaceutical
17 cases and all kinds of different cases.

18 In a case like this it's class
19 counsel's duty to negotiate -- to consider the class
20 as a whole when negotiating a global resolution and to
21 achieve the best results under the circumstances in
22 the particular case.

23 Although we were prepared to litigate
24 each and every one of these cases to trial, and in
25 fact we were in the middle of litigating preemption

1 when we settled this case, that issue alone could have
2 dismissed thousands of cases in this litigation.

3 Co-lead counsel decided that the class
4 as a whole be best served by a global resolution if
5 one could be achieved on the right terms.

6 At the urging of Your Honor the parties
7 began a series of meetings to explore settlement.

8 Coming into these negotiations we were prepared to
9 make demands on all categories of injuries. In our
10 complaint we allege that concussions and sub-
11 concussive hits result in Alzheimer, ALS, dementia,
12 Parkinson's, anger, mood swings, depression, sleep
13 loss, we had a whole number of injuries.

14 In the end, based upon the back and
15 forth of these hard fought negotiations, the
16 scientific considerations, and the legal issues
17 foreseeable in the case, the parties agreed to the
18 settlement terms we now present to this Court today
19 for approval.

20 The question for Your Honor today is
21 not whether the settlement is perfect, but whether
22 it's fair, reasonable, and adequate, and under the
23 circumstances of this case and the controlling Third
24 Circuit law this settlement is entitled to a
25 presumption of fairness.

1 So, Judge, now I'd like to go through
2 the settlement and some of the issues in the case for
3 class certification.

4 Your Honor, I just want to -- do you
5 see my PowerPoint up on your screen?

6 THE CLERK: He has to touch the feed.

7 MR. SEEGER: What's that?

8 THE CLERK: He has to tap your feed.

9 MR. SEEGER: Tap the feed. Whatever
10 that means.

11 THE COURT: Do you want to help him?

12 (Pause)

13 MR. SEEGER: All right.

14 THE COURT: I don't have it, Jim.

15 Thank you. All right, I can see it now.

16 MR. SEEGER: All right.

17 THE COURT: There's no problem now.
18 Can everybody see it?

19 MR. SEEGER: And you know what, Your
20 Honor, maybe -- I also have a hard copy if you want to
21 follow along that way.

22 THE COURT: Perfect.

23 MR. SEEGER: So I'll hand you two. One
24 for Jack as well.

25 THE COURT: Okay, that's fine.

1 MR. SEEGER: Okay.

2 THE COURT: And I don't -- can
3 everybody see -- can you see it, Ms. --

4 UNIDENTIFIED SPEAKER: (Indiscernible -
5 10:08:26).

6 THE COURT: Okay. That's fine. Okay.

7 MR. SEEGER: Your Honor, there are
8 three components to the settlement. There's a
9 baseline assessment program, monetary award fund, and
10 an educational fund.

11 Let's talk about the baseline
12 assessment. I'll try to get through some of this
13 quickly because I know I have a limited amount of
14 time.

15 It's a -- there is \$75 million
16 committed to the baseline assessment program. It
17 includes neurological examinations and comprehensive
18 neuropsychological tests for all NFL players that want
19 to avail themselves of it. We're hoping all of them
20 do.

21 The BAP (ph) administrator will select
22 an independent group of medical professionals who will
23 handle these tests, and all you need to be able to go
24 through the baseline assessment program is a half a
25 season -- a half eligible season in the settlement,

1 and if the players are age 43 or older they have two
2 years to be tested, and if they're younger than 43
3 they have up to 10 years to be tested.

4 And again, I mentioned that we don't
5 have to spend a lot of time on this, the importance --
6 it is throughout the medical literature the importance
7 of diagnosing these diseases early, getting the
8 treatment, and prevention. This is a very important
9 part of the program, Your Honor.

10 So what could be diagnosed through the
11 BAP testing program? The levels of neurocognitive
12 disease that we've identified. Level 2, which is
13 moderate dementia. Level 1.5, which is what we call
14 early or mild dementia, Your Honor.

15 THE COURT: Is that the same? Because
16 sometimes it's called earlier and sometimes it's
17 called mild.

18 MR. SEEGER: It's referred to both in
19 the literature, Your Honor. And I think for the
20 purpose --

21 THE COURT: And so that --

22 MR. SEEGER: Yes.

23 THE COURT: Do you agree with that?

24 MR. KARP: We do, Your Honor.

25 THE COURT: Okay. All right.

1 MR. SEEGER: Thank you for pointing
2 that out, Your Honor.

3 And then we provide supplemental
4 benefits. So if somebody doesn't rise to the level of
5 a qualifying condition, Your Honor, but they're
6 diagnosed with impairment not rising to the level of
7 qualifying condition we will get them that important
8 additional testing medical treatment and
9 pharmaceutical care, if necessary.

10 The monetary award fund critically and
11 very important to this is uncapped. Every qualifying
12 diagnosis over the 65-year life of this settlement
13 will be paid. That is guaranteed now by the NFL. The
14 qualifying diagnoses are ALS, Parkinson's, Alzheimer,
15 Level 2, which is moderate dementia, Level 1.5, which
16 is earlier mild dementia, and that's with CTE for
17 players who passed away prior to July 7th, 2014 and
18 has a pathological finding of CTE on the brain.

19 Again, the highlights, no player need
20 establish causation as they would have to do if this
21 were being -- this were a case tried before a jury.

22 And the diagnoses are all going to be
23 made by qualified professionals, and the diagnosis
24 will be set at the date that the diagnosis is made by
25 a medical professional for the purposes of

1 compensation.

2 There are adjustments in the payment
3 scheme that deal with the number of years played in
4 the NFL, the age of the player at the time of
5 diagnosis, and I'll talk about those later in my
6 presentation, and there are adjustments for players
7 who suffered a stroke prior to certain conditions and
8 brain trauma not related to football play.

9 And here's just a -- how the seasons
10 breakdown, the number of seasons needed to qualify for
11 a full award.

12 Now, importantly in a player is
13 diagnosed with Level 1.5 dementia let's say, Your
14 Honor, which is early to mild, and they progress into
15 Level 2, they will get a supplemental benefit. We
16 will look at it again and they will be paid additional
17 money that correlates with where they are on the grid
18 for Level 2 dementia. If they advance into Alzheimer
19 they could be -- they could be eligible for an
20 additional compensation there. That's very important.
21 They can reapply to the program throughout their life.

22 And one thing that we all encountered,
23 those of us who talk to players all the time as we
24 have throughout, is they may have a diagnosis which is
25 just short of a qualifying diagnosis. Well they're

1 not out of the program, they can keep coming back if
2 these are degenerative diseases, and we don't wish
3 these on anybody, but God forbid a player digresses
4 and he gets sicker he can reapply for these awards,
5 and that can happen throughout his lifetime.

6 Statutory lien is a very important
7 aspect of this settlement are being dealt with by
8 plaintiffs' counsel, by class counsel. We're taking
9 the power and the size of this fund and we're going to
10 negotiate lien reductions for the players far beyond
11 anything an individual lawyer could do or the player
12 could do for themselves. These lien reductions will
13 be substantial, and it won't affect their eligibility
14 if they're getting Medicare or Medicaid. Their future
15 eligibility is preserved.

16 And finally in terms of additional
17 features is that we will allow modifications to the
18 settlement to incorporate new diagnostic tools, and
19 the parties are going to continually, even though the
20 agreement says every ten years, we're going to work
21 together all the time to keep an eye on this, and we
22 will in good faith make sure that if they're necessary
23 and needed they will be implemented.

24 THE COURT: So if it's good faith your
25 representation; is that correct?

1 MR. KARP: It is, Your Honor.

2 THE COURT: All right. That means that
3 there is -- there can be judicial oversight of that.

4 MR. SEEGER: Yes, Your Honor.

5 THE COURT: Do you agree with that,
6 Mr. Karp?

7 MR. KARP: We do. It's laid out in the
8 agreement. Yes.

9 THE COURT: Okay. Thank you.

10 MR. SEEGER: Thank you, Your Honor.

11 And finally the education fund, which
12 in terms of the dollar amount is a small aspect of
13 this, but it's important, because it's going to be
14 used to educate retired players regarding benefits
15 that are available to them that they may not be aware
16 of. We've had numerous discussions with players who
17 would qualify for benefits that are provided now by
18 the NFL that don't know they're there for whatever
19 reason, and we're going to make sure that they know
20 whatever benefits they are. Counseling, whatever it
21 is.

22 And we're going to try to establish
23 programs and work with programs to make football safer
24 so that players learn how to hit in a safer way to
25 avoid some of these injuries.

1 Also the agreement there are numerous
2 CBA benefits that have been collectively bargained
3 for. I just mentioned them.

4 What we learned while we were
5 negotiating is that in the 2011 collective bargaining
6 agreement there's a neurocog program -- a
7 neurocognitive impairment program that had a waiver in
8 it. The waiver said you either go into the benefits
9 program or you go into the tort system, but you
10 couldn't do both. The NFL in the context of this
11 settlement has agreed to waive that. So now players
12 can avail themselves of the settlement and they can
13 avail themselves of the benefits. There's going to be
14 no problem there with that.

15 THE COURT: That's correct, is it not?

16 MR. KARP: It is, Your Honor, and I'll
17 be addressing that in my remarks shortly.

18 THE COURT: Okay.

19 MR. SEEGER: We don't touch workers'
20 compensation claims, they can still file them, or
21 other claims. If a player thinks that they should
22 bring a case against their high school or their -- or
23 college they can do that. There's no release of those
24 claims.

25 I'd like to talk for a minute now about

1 class notice. I've never been involved in a case
2 where the notice was as extensive, as well written as
3 in this case, and there is evidence -- there is
4 evidence of the effect of this good notice, which I'm
5 going to get to, but let me first mention that we
6 directly mailed over 33,000 notices -- actual notice
7 to retired players and their families.

8 We had it on television programs, we
9 published notice, we had short forms of the notice
10 that said -- even though it didn't lay out in that
11 one-page short form the entire deal, it told them
12 where to go to find out, and that's important.

13 We had a website. That's important
14 because we -- I'm going to show you in the next slide,
15 but I want to spend a moment on this, I want to talk
16 about media, but on the next slide I'm going to show
17 you what the impact of that notice was. We can do
18 that here.

19 This case was extensively covered in
20 the media from the time we filed the case. Every
21 aspect of it, every change in the settlement, when
22 Your Honor denied preliminary approval stories were
23 run, they were repeated hundreds of times, every
24 aspect of the settlement was discussed and criticized
25 by the press, and some aspects I believe unfairly, but

1 it was out there, you know, everybody was talking
2 about it.

3 In addition to that the objectors had
4 their own websites. Mr. Molo had a website with his
5 objectors putting in my view misinformation out there
6 about the settlement. But they did it and that's what
7 it is. It didn't really have much of an impact, but
8 I'll come back to the point about why it's important.

9 As a result of this notice we had
10 66,000 visits to our website in a class of over
11 20,000. That's amazing. That means family members
12 for those who probably couldn't -- are checking the
13 website and getting information.

14 We had more than 4,500 calls to our
15 call center. Twenty-three hundred callers spoke with
16 a live operator.

17 Over 5,000 players preregistered
18 themselves for benefits, and the registration program
19 is not yet open, but they've asked to be included and
20 gave their identifying information.

21 And as a result of that we have less
22 than one percent of the class has opted out. And I'll
23 tell you something interesting about that. That
24 number is going down. Because if you -- if we -- you
25 look at the reports filed by BrownGreer players are

1 coming back and saying I made a mistake, I want to
2 come back in. I hope that continues. They can come
3 back in. But the number was up over 200 and now it's
4 down as of today to 199. So players are coming back.

5 Now why is that important? Because I'm
6 not aware of a case that had so much information.
7 There was extensive press coverage as I said, and in
8 addition to that websites like Mr. Molo where they
9 spoofed off our name where the name of our website was
10 "Concussion Settlements," he's created a website
11 called "Concussion Settlement Facts."

12 MR. MOLO: Judge --

13 MR. SEEGER: I'm presenting Mr. Molo.

14 THE COURT: You can respond.

15 MR. SEEGER: You've spoken, this is my
16 time.

17 THE COURT: You can respond.

18 MR. MOLO: No, because this is not
19 correct. Thank you.

20 MR. SEEGER: I get to speak for the
21 class.

22 Judge, I'm not upset with Mr. Molo
23 about it. It's important -- it's an important fact
24 for the record.

25 THE COURT: Well despite the fact that

1 you're not happy about it I appointed Mr. Molo to
2 represent the defendants.

3 MR. SEEGER: No, I wasn't happy about
4 it.

5 MR. MOLO: Thank you.

6 MR. SEEGER: I'm not even happy he's
7 here.

8 (Laughter)

9 MR. SEEGER: But now I get a chance to
10 talk to Your Honor, and I get to speak for the over
11 20,000 players who said yes for the settlement.

12 The one -- the less than one percent
13 who have opted out has gone down, but the only point I
14 want to include on, and I'm going to move off it, is
15 the fact that I'm not aware, except in one other case
16 we found from the district of New Jersey, where
17 objectors launched a campaign against our notice
18 campaign and we still have this result. That's my
19 only point. And less than one percent objecting.

20 Your Honor, I'm going go through some
21 of the Rule 23 factors pretty quickly because we don't
22 really have a disagreement, even the objectors don't
23 dispute that there's numerosity in this case, we have
24 over 20,000 retired players.

25 The common questions there's no real

1 dispute. What are they? The -- some of the questions
2 that are common to this class are the nature and
3 extent of the duty of the NFL to the retired players,
4 whether the duty was breached, whether the NFL knew
5 and suppressed information, whether these concussive
6 and sub-concussive hits increased the risk of the
7 Alzheimer, ALS, Parkinson's, dementia, and
8 neurocognitive impairment, whether the NFL's
9 affirmative defenses are preemption workers' comp
10 would have barred discovery. Those are the common
11 questions, no real dispute on that.

12 Typicality is met in this case, because
13 the conduct that we allege arises -- it's the same
14 conduct throughout the class. The class
15 representatives, Shawn Wooden, played nine seasons in
16 the NFL, he experienced concussive and sub-concussive
17 hits, he suffers from neurological symptoms, although
18 they're not a qualifying diagnosis, and he has
19 headaches, sleep problems, mood swings, concentration
20 loss, all the things that we had in our complaint. He
21 has not been diagnosed with a qualifying injury.

22 Kevin Turner who is our Subclass II
23 representative played eight seasons in the NFL for the
24 Patriots and the Eagles. He experienced numerous
25 concussive and sub-concussive hits and he was

1 diagnosed with ALS, which is a qualifying condition in
2 2010.

3 So the conduct arises from the same
4 conduct. Shawn Wooden, Kevin Turner, retired NFL
5 players whose claims arise from the same conduct as
6 the two subclasses.

7 Predominance. Again, these questions
8 predominate over individual issues. No real dispute
9 here, not many objectors have even raised this as a
10 concern.

11 Superiority we know under Anchem (ph) is
12 really not an issue because the whole idea here is to
13 avoid a trial. So the issue of manageability is a
14 non-issue here.

15 Adequacy we do have some push back from
16 some of the objectors, and I'll spend a minute or two
17 talking about it. Adequacy is a two-prong inquiry.
18 It looks at the qualifications of counsel and it looks
19 to whether there's a conflict between the subclass
20 representatives and their interests and the interest
21 of the class.

22 Co-lead counsel -- my qualifications
23 are in my affidavit, Your Honor. When you look at my
24 qualifications, Saul Weiss' qualifications, Gene
25 Locks, Steve Marks, Arnold Levin, Diane Nest, these

1 are attorneys who do this every day. This is not our
2 first case like it is for some of the objectors'
3 counsel. We do -- we handle personal jury cases.
4 This is what we do. And we do it time in and time and
5 again, and our qualifications are pretty well laid
6 out. We have tried numerous bell weather cases. I
7 myself have tried numerous bell weather cases in MDLs
8 and in front of many judges in state and federal
9 court, which are representative trials.

10 We have litigated preemption issues,
11 Daubert issues, dispositive challenges involving
12 complex injury claims.

13 We've negotiated the resolutions -- if
14 you add my co-counsel in the number will go up to many
15 billions of dollars in settlements that have been
16 handled. Arnold Levin was co-lead counsel in the Diet
17 Drugs litigation. A multi-billion settlement right
18 here in the Eastern District. We have handled --

19 THE COURT: Someone is having trouble.
20 Yeah, maybe they want some water?

21 MR. SEEGER: Oh.

22 THE COURT: We don't give much around
23 here, but we do -- we do give water.

24 MR. SEEGER: I've got an extra bottle
25 right here. I have a cold so you won't want mine.

1 The lien --

2 THE COURT: Thank you.

3 MR. SEEGER: -- resolution program that
4 we are presenting to Your Honor as part of this deal,
5 this is -- we've done this in numbers of cases. In
6 fact I believe it might have been -- I was co-lead
7 counsel in a case in front of Jack Weinstein involving
8 a drug called Zyprexa where it was one of the first
9 cases where we rolled out the lien resolution program
10 on a mass-wide basis throughout -- make sure she's
11 okay? You all right? And it was very, very
12 successful there. It was very successful in Vioxin
13 and many other cases where it's been done.

14 So we've got the -- we've got the two
15 separate subclasses. Subclass I, who Mr. Wooden
16 represents, are players who've been injured, have
17 played in the NFL, suffered concussions but not yet
18 have a qualifying diagnosis. Kevin Turner, Subclass
19 II representative has had concussions, played in the
20 NFL, represents players with a qualifying diagnosis.

21 And why this works and why there are no
22 conflicts, Your Honor, is for the reason in this
23 slide. The motivation of Subclass I was to insure
24 that without -- that players without a qualifying
25 injury today would have the money later to compensate

1 injuries that would come down the road in the future.

2 Subclass II was motivated to bargain
3 for the best deal that they could presently get, and
4 because the monetary award fund is an inflation
5 adjusted and uncapped any possibility of a conflict
6 between those two classes is eliminated.

7 And we have language from prudential
8 where it says:

9 "Where both named plaintiffs and other
10 class members would need to prove the same allegations
11 in order to succeed on any of the claims the proposed
12 class satisfies the adequacy of representation
13 requirement of 23(a)."

14 Now what are some of objectors'
15 adequacy complaints? Well they say we should have had
16 numerous subclasses. When you figure out all the
17 subclasses that all the objectors together say we
18 should have had, when you layer on top of that public
19 citizen we would have had the problem that we were
20 warned against in the Cendant litigation, which is a
21 balkanization of this class action to the point where
22 every little interest would be represented and you
23 would never be able to put a settlement together with
24 the NFL or any defendant. It would -- the settlement
25 would implode on itself. That was the problem.

1 The interests are represented by the
2 class by these two subclass represents, the classes
3 work perfectly, they involve all NFL players diagnosed
4 and not diagnosed today, it is uncapped and inflation
5 adjusted. There is no conflict.

6 As our expert, Professor Calanoff (ph)
7 says, too many subclasses is just inherently
8 unmanageable.

9 So what do they say? The settlement
10 should provide what they're specifically saying,
11 because this really isn't about adequacy, it's about
12 where you draw the line. We want more money, we
13 should have gotten more money, we should have defined
14 the qualifying diagnoses differently, we should employ
15 different award reductions, they don't like the way we
16 did that, and they don't -- they generally just don't
17 like the way we did it, so they want to do it their
18 way. But these aren't objections to adequacy, they're
19 objections to where the lines were drawn.

20 As you can see from Judge Phillips'
21 quote from his affidavit, "The compromise was reached
22 after many months of vigorous arms length negotiations
23 supervised by a court-appointed mediator." In that
24 case it was Judge Phillips, and in the settlement
25 after you denied preliminary approval, Your Honor, it

1 was Special Master Golkin.

2 The class representatives' interest are
3 closely aligned with those of the class members such
4 that fair and adequate representation can be insured
5 and sufficient unity exists for the settlement class
6 certification purposes.

7 There are no Anchem issues as has been
8 asserted. There are no futures issue. The entire
9 class played in the NFL is discernible and was exposed
10 to head impacts. The monetary award fund is uncapped.
11 Awards are inflation adjusted and there's no cash flow
12 maximum. After final approval the NFL is bound, they
13 can't walk from the deal. And the two subclasses and
14 separate representation afforded structural protection
15 beyond those afforded by the deal itself, Your Honor.

16 So, I'd spoke earlier about the strong
17 presumption in the Third Circuit in favor of voluntary
18 settlement agreements. This presumption is especially
19 strong in class actions. That's from the Sullivan
20 case. And there's an overriding public interest in
21 settling class action litigation.

22 In order for Your Honor to assess the
23 fairness of this Girsh versus Jepson says to Your
24 Honor there are nine factors that have to be
25 satisfied, and I will quickly go through those.

1 The first one is the complexity and the
2 duration of the litigation. Well the complexity --
3 just think about what the discovery would have been
4 like in this case in any kind of a case involving
5 neurocognitive problems. Let's take, you know,
6 depression, for example.

7 I have handled suicide cases, I've
8 handled depression cases, I know what discovery looks
9 like in those cases. I've personally handled those.
10 They ask for everything. They ask for educational
11 records that go back to the time you were
12 kindergarten. They want the educational records of
13 your parents, because part of the neurocognitive
14 profile is it's a loss of intelligence so they want to
15 -- they want to get those records. When you're
16 talking about depression they want to know what kind
17 of drugs you take. Are they legal or are they
18 illegal? Do you drink alcohol? What is your -- what
19 is your sexual orientation is important. I've had
20 that come up in depression cases. Do you -- are you
21 involved in extramarital affairs? Do you have
22 financial problems?

23 You could just imagine I could go on
24 and on what the list would be of what the NFL would
25 want in a case that was going to trial involving the

1 claim of anger or depression or some of those other
2 things.

3 The NFL would attack plaintiffs'
4 experts on Daubert. You've seen their affidavits,
5 Your Honor, that's a glimpse of what the case is going
6 to look like for opt outs who will want to go to
7 trial. That's what they'll be dealing with.

8 Prior to trial the NFL would challenge
9 many of the legal issues. We were fighting
10 preemption. Your Honor noted herself the risk
11 involved in that. But, you know, when -- and I have a
12 slide where I want to talk about preemption. The NFL
13 has one preemption cases in other parts of the
14 country. It's not like, you know, we just said, hey,
15 there's risk, I'm talking about now co-lead counsel's
16 assessment of the risk on that, which is important.
17 It doesn't relate to anything that happened in this
18 court. I was able to look at what the law was and
19 look at what the risk was in other courts, and I'll
20 talk about that.

21 And it would be a -- it would have been
22 an expensive, scorched earth litigation, we know that
23 because parties who have litigated with the NFL know
24 that they're in it typically for the long haul and
25 what that means.

1 The reaction of the class to the
2 settlement, I speak about it in the notice. We had
3 extensive notice, we had extensive media coverage,
4 including misinformation campaigns, and then unrelated
5 to what Mr. Molo is doing, we had players themselves
6 -- this is a cohesive community. I mean these guys
7 are like the marines, they talk to each other, there
8 is a -- there is a brotherhood here. If you go on any
9 chat room or blog site there are many of them
10 discussing the settlement all long. And they talk to
11 each other, they have email lists for each other. I
12 mean we're talking about like household names. When
13 you mention the name of an NFL player all these other
14 plays know who they are, they're friends with them.
15 So they're very cohesive and they were talking to each
16 other, and they decided to overwhelmingly accept this
17 deal.

18 So the class reaction has been
19 extremely positive, and in the Third Circuit really
20 argues in favor of approval just on that point alone.

21 The stage of the proceedings we were
22 in, I mean Your Honor knows this, we were in the
23 process of litigating a threshold issue on preemption.
24 We had very important legal issues besides the
25 preemption issue. The NFL, and they've said this in

1 their papers, intended to bring a motion to hold the
2 NFL as a co-employer with the teams. If that would
3 have happened all of the players would have been
4 relegated to a workers' comp claim. And as I said,
5 they would have challenged the science at every level.

6 And at the end of the day this was a
7 science-driven case. Everything that the plaintiffs'
8 lawyers needed to know about the science was in the
9 medical literature. We've read it -- we read it all,
10 we studied it all, we know everything that the experts
11 that are proposed by the objectors have had to say, we
12 know everything they've published, we know everything
13 our experts have said, we know -- we knew everything
14 that was out there, and at the end of the day it was a
15 science-driven case.

16 People can talk about discovery, you
17 can talk about fraud, you can talk about these issues,
18 but you don't get to jump over causation and go right
19 to those issues. As you know, Your Honor, we would
20 have to prove all of those elements to get the case to
21 the jury.

22 The parties and Judge Phillips, says,
23 this is a comment from his affidavit:

24 "The parties consulted with and relied
25 on their respective independent medical experts in the

1 fields of neurology, neuropsychological, and other
2 relevant specialties in order to understand the
3 science regarding the diseases associated with
4 concussive head trauma and their pathologies to
5 evaluate the strength of plaintiffs' claims."

6 The risks of establishing liability,
7 risk of establishing damages, factors four and five
8 under Girsh. Well, I've been through these and I
9 don't think I need to spend too much more time on
10 them.

11 Statute of limitations would have been
12 a big part. Our settlement allows a player who played
13 in the '80s if he gets sick today to come in and get
14 compensated. You know, I'm not going predict whether
15 that claim would be dismissed on a statute of
16 limitations, but we could all as attorneys and judges,
17 we can all look at that and see that there are issues
18 there whether that case would be time barred or not.
19 It isn't time barred in this settlement.

20 Assumption of risk would have been a
21 big factor by the NFL.

22 Now, I want to talk a little bit about
23 the preemption issue, because it gets pooh-poohed from
24 time to time, but it was a big issue, Your Honor, and
25 if you remember we brought in one of the country's

1 best authorities on preemption, David Fredericks, to
2 come in here and argue to Your Honor. The NFL brought
3 in an expert. We extensively briefed it. I mean the
4 briefs went on for pages and pages and pages. Your
5 Honor unfortunately had to read all that because we
6 settled right before you were about to rule. But
7 here's a case involving a player, Stringer, where the
8 Court found preemption and dismissed the case. That
9 was a factor going into this.

10 THE COURT: Is that the California
11 case?

12 MR. SEEGER: This was Corey Stringer.
13 The Corey Stringer case. I'm not exactly sure what
14 court.

15 MR. KARP: I believe it's Minnesota.

16 THE COURT: Minnesota. Okay.

17 MR. SEEGER: Thank you.

18 THE COURT: Thank you.

19 MR. SEEGER: Maxwell versus the NFL.
20 Here we have a quote from the opinion that says, "The
21 Court finds that plaintiff's second cause of action
22 for negligence against the NFL is preempted."

23 And although this next one I'm showing
24 I'm not asserting for the fact -- I'm not saying the
25 case has been dismissed at any means, Mr. Duerson (ph)

1 is in the class, but here is a case from the Northern
2 District of Illinois where the judge in a different
3 context commented:

4 "That even if the NFL's duties -- I'm
5 sorry -- NFL's duty arises apart from the CBAs
6 therefore the necessity of interpreting the CBAs" --
7 the collective bargaining agreements -- "to determine
8 the standard of care still leads to preemption."

9 This is what the players were up
10 against, Your Honor.

11 And we would have had to establish, as
12 I've commented both general causation, that is due
13 concussions caused these diseases, and then we would
14 have had to prove specific causation. So the player
15 would have had to prove that there was a documented
16 concussion, that his problems occurred in the NFL as
17 opposed to college, high school, or pop warner, and
18 that the specific disease we were complaining of in
19 that case was directly related to the concussions.

20 Girsh factor six, the risks of
21 maintaining a class action.

22 Well, Your Honor, the one big piece of
23 this case that gets put aside in the context of a
24 settlement, because the idea is to avoid a trial, is
25 the issue of manageability. That issue in the context

1 of a settlement is put aside. But in the context of a
2 litigation between us and the NFL the NFL would have
3 fought manageability very tough and it could have been
4 a big issue there. It could have prevented class
5 certification. And then even if Your Honor granted
6 the class for us, as we believe we would have asked
7 you to and think you should have, the NFL had the
8 right to go up to the Third Circuit, as Mr. Molo did
9 when he took us up on the 23(f) appeal, the NFL could
10 have done that.

11 The seventh factor, the ability of the
12 defendants to withstand a greater judgment. Your
13 Honor, I don't have to spend a lot of time on this
14 because Your Honor has written on this. This is a
15 case that you handled, Your Honor. I'm going to say
16 it wrong, I think it's Jakesian (ph). I guess, you
17 know, the only thing -- the only question I raise
18 here --

19 THE COURT: You're insisting I be
20 consistent, is that what you're -- are you insisting
21 that I be consistent?

22 MR. SEEGER: Yes, we would like you to
23 be, Your Honor.

24 (Laughter)

25 MR. SEEGER: I'm quoting back your

1 case. Which is something actually by way of passing
2 I'll note that Mr. Molo waited until the day before
3 our brief was due to actually brief this factor. And
4 guess what he -- he put a lot of information about how
5 much money the NFL has, all their contracts, guess
6 what he didn't put in that supplemental brief? Your
7 case. I can't figure that out. Maybe he can explain
8 that when he stands up.

9 And Your Honor said and that courts in
10 this district regularly find that, you know, the issue
11 is really neutral on the ability to pay. It really is
12 a factor when you have a defendant who might not be
13 able to pay. That's not the case here, Your Honor.

14 The range of reasonableness of the
15 settlement in light of the best recovery. Well, I
16 mentioned earlier I, co-lead counsel, class counsel,
17 the PEC, and we draw upon that experience, have
18 negotiated many of these settlements.

19 I will tell you that the values
20 achieved in this settlement are on the high end of
21 what anybody could find that's out there in the
22 context of a class or even a mass aggregate
23 settlement. These are very rich values. In many
24 cases with the younger players that go into millions
25 of dollars, and with the older players they don't go

1 into millions of dollars. And I'll discuss why -- why
2 that adjustment was made, but they're still very
3 significant values that I would challenge anybody to
4 say anything about in the context of a deal like this.
5 They are on the high end.

6 I handled the PPA litigation in front
7 of Judge Barbara Rothstein who ultimately -- who
8 approved that -- that was a class case -- who approved
9 that. This settlement had better values. That
10 involved injuries relating to stroke, and she
11 ultimately became the head of the Federal Judicial
12 Center. In Diet Drugs, Arnold Levin handled that
13 case. Those are substantial values. I would say this
14 settlement has richer values than that one does. And
15 in Vioxx, a case that I handled that settled for
16 almost \$5 billion. I could tell you that on a
17 generalized basis the values here are higher.

18 And I said in my declaration that we
19 strived to obtain the best overall deal we could for
20 plaintiffs taking into consideration the projected
21 incidents of plaintiffs' injuries, the value of the
22 claims, the risk of the litigation, including the
23 pending motions at the time on preemption.

24 And Judge Phillips says:

25 "In particular it's my considered

1 judgment that plaintiffs would be unlikely to have
2 obtained more money and benefits without going through
3 years of discovery and trial where they would face
4 substantial risk of loss due to their inability to
5 prove negligence or fraud on the part of the NFL
6 parties or judgments below what they will receive in
7 this proposed litigation -- this proposed settlement."

8 So, I want to deal now with some of the
9 objectors' concerns, because they don't really impact
10 at all the fairness of this case. It's really line
11 drawing that they could have done it better or should
12 have gotten more, should have tweaked this that way.

13 So they say the settlement doesn't
14 compensate CTE in living persons. That is one of the
15 biggest misinformation points that some of objectors'
16 counsel has put out there.

17 This settlement does not compensate
18 CTE, it compensates the injuries and the diseases, the
19 most significant ones that we were able to agree upon.
20 The injuries and diseases associated with CTE. So
21 let's make that clear right off the bat.

22 CTE is not diagnosable in living
23 people. Their experts agree with that. There is for
24 way to detect CTE in a living person today. And the
25 settlement -- the settlement compensates the most

1 serious neurocognitive and neuromuscular injuries
2 associated with TBI, and that is ALS, Alzheimer,
3 Parkinson's, and dementia, which had been reported in
4 patients determined to have CTE. Those are from our
5 declarations of our experts Dr. Fisher and Dr. Deza
6 (ph).

7 Through the pathological diagnosis of
8 -- though the pathological diagnosis of CTE is not
9 compensated as an injury perspective, the most
10 serious cognitive impairments developed in living
11 retired players that have been associated with the
12 literature we see here are compensated. The most
13 serious diseases are compensated.

14 It says, "The settlement doesn't
15 compensate" -- and these are all the things they say
16 that could have been compensated in their opinion.
17 Epilepsy, multiple sclerosis, deafness, dizzy spells,
18 vision problems, headaches, depression, mood swings,
19 substance abuse.

20 The plaintiffs -- we demanded going
21 into this settlement we wanted compensation on all of
22 those things, they're alleged in our complaint, but as
23 I said early when we started, that when you get into a
24 tough negotiation with a party like the NFL and things
25 have to be factored in. The science of the case, the

1 risks of litigating, all those things come to play.
2 At the end of the day we wound up with an excellent
3 settlement that tests young players or even older
4 players to find out if they have any of these
5 problems, if they do and they have a qualifying
6 diagnosis they get compensated, and if they don't
7 they're going to find out right away what their
8 condition is. And if they ever progress down the road
9 the fund will be there for them.

10 Now one of the problems that we have,
11 and maybe the objectors can address this when they
12 stand up, is that these things that they said need to
13 be included, depression, these are things that occur
14 in the general population and are reported independent
15 of concussions.

16 If you go a search on Goggle right now
17 for the amount of money the pharmaceutical industry
18 makes selling antidepression drugs you will find out
19 that tens of millions of people take them and they
20 make tens of billions of dollars selling they will,
21 and those people don't play in the NFL.

22 I'm not pooh-poohing or diminishing
23 depression, I believed it was associated with
24 concussions, but you have to take the science as it
25 exists at the time you're negotiating, and even

1 plaintiffs' experts can't conclusively say that
2 depression is associated with it -- I mean objectors.

3 It's reasonable for settling parties to
4 make choices and compromises. If a class member with
5 one of the excluded conditions was upset he had the
6 opportunity to opt out, and that's something that did
7 not occur in a big way in this case. There are under
8 200 opt outs in a class of over 20 something
9 thousands.

10 So the objectors say monetary award
11 offsets are unfair and they have complaints concerning
12 the reductions for fewer than five years in the NFL
13 play, reductions based on age, reductions based on
14 stroke or severe brain trauma before a qualifying
15 diagnosis. And each and every one of those reductions
16 had a reason in logic, science, and fact.

17 The reductions as Tom Vasquez (ph), our
18 expert says -- our economist:

19 "Reduction is based on years -- on
20 years played accounts for reduced exposure to the NFL
21 impact relative to a player's earlier years of play
22 versus college, high school, and grade school.

23 Reductions based on age at diagnosis
24 reflects relative grade or joint casualty for
25 background risks with increasing age."

1 What we found in the medical literature
2 is that when you get over the age of 60, when you're
3 70 years old you're -- the chance of developing
4 dementia just by the aging process and other things
5 that go on in the body, was much higher than the risk
6 of you developing that -- and I say you in the generic
7 way -- or a player developing that because it related
8 to concussions or NFL play, which would have occurred
9 20, 30 years prior.

10 Reductions for stroke and severe TBI
11 parallel medical references showing increased risk for
12 such events and greater difficulty establishing
13 liability at a trial with such facts. Each of these
14 points though --

15 THE COURT: What's TBI?

16 MR. SEEGER: Traumatic brain injury.

17 THE COURT: Okay. Thank you.

18 MR. SEEGER: Each of these points I
19 want to make clear though was the subject of fierce
20 and protracted negotiations. We fought on every
21 single one of them, and there were times they walked
22 out of the room, and there were times we walked out of
23 the room, and we were screaming at each other on the
24 phone in the early morning hours while objectors --
25 many of the objectors' counsel didn't even have a

1 horse in the race. Some of them don't even have
2 clients that filed a case. They were not involved.
3 They didn't offer their services to us then. We only
4 found out about them once the settlement came up.

5 Professor Calanoff says:

6 "Objectors' complaints reduced to one
7 of how the settle's lines were drawn. If drawn
8 differently or more favorably toward objectors another
9 class member would have a concern as to the place
10 where that line fell."

11 You're not going to make anybody happy
12 in a line drawing battle.

13 So what we got, as I started out
14 saying, was something that maybe isn't perfect, but it
15 is really good and it is clearly fair.

16 And that is the end of my presentation.
17 And I actually think I came up a little bit early on
18 time, Your Honor.

19 THE COURT: Okay.

20 MR. SEEGER: So I will hand off now to
21 Mr. Karp.

22 THE COURT: One second. Let me -- let
23 me speak with counsel at side bar, please.

24 MR. SEEGER: Sure.

25 THE COURT: For one moment. No, I'm

1 going to speak to -- Mr. Molo, I just want to speak to
2 counsel who were up here. I'll speak to you later.

3 This is -- this has to do with --

4 (Sidebar)

5 THE COURT: (Indiscernible - 10:44:11).

6 All right. Please come forward.

7 MR. SEEGER: Do you want us to remain
8 up here?

9 THE COURT: Yes. Please come up.

10 Yeah. (Indiscernible - 10:44:32). Listen, the
11 question -- and I want you to be prepared, the
12 question I -- Mr. Molo, hello.

13 MR. MOLO: Hello, Judge. Thank you for
14 having me.

15 THE COURT: Right. Because if they
16 finish early I'm going start with you.

17 MR. MOLO: Whatever -- however you want
18 to handle it. However you want to do it. Can we take
19 a break at 11:00 (indiscernible - 10:44:54) to be able
20 to complete my presentation at noon time
21 (indiscernible - 10:44:57).

22 THE COURT: Yes. Okay. Well then you
23 should be able to go to 1 o'clock.

24 MR. MOLO: Yeah. Yes.

25 THE COURT: I mean I don't think a half

1 hour should be -- we're at 11:00, and it would take
2 five minutes for a break, it's 12:00, and we'll have
3 -- we'll put your particular presentation on.

4 MR. MOLO: Okay. Okay.

5 THE COURT: All right. (Indiscernible
6 - 10:45:16) come back.

7 MR. MOLO: Sure.

8 THE COURT: Is that okay?

9 MR. MOLO: Yes.

10 UNIDENTIFIED SPEAKER: Thank you, Your
11 Honor.

12 THE COURT: All right. Okay.

13 (Sidebar concluded)

14 THE COURT: Just a little bit of
15 tidying up about when we're going to again and when
16 we're going end.

17 Okay. Mr. Karp, are you next?

18 MR. KARP: I am, Your Honor.

19 THE COURT: All right.

20 MR. KARP: Okay. Good morning, Your
21 Honor.

22 THE COURT: Good morning.

23 MR. KARP: I'm Brad Karp, counsel for
24 the National Football League and for NFL Properties.
25 With me at counsel table are my partner, Bruce

1 Birenboim.

2 MR. BIRENBOIM: Good morning, Your
3 Honor.

4 MR. KARP: NFL senior counsel Anastasia
5 Danias, Bob Heim from the Dechert firm.

6 MR. HEIM: Your Honor.

7 MR. KARP: And I would also like to
8 introduce my stellar team at Paul, Weiss. We have my
9 partner, Lynn Bayard.

10 MS. BAYARD: Good morning, Your Honor.

11 MR. KARP: Brian Stekloff.

12 MR. STEKLOFF: Good morning, Your
13 Honor.

14 MR. KARP: Doug Burns.

15 MR. BURNS: Good morning, Your Honor.

16 MR. KARP: Ralia Polechronis.

17 MS. POLECHRONIS: Good morning.

18 MR. KARP: And we're also pleased to
19 have with us today Sheila Burnbalm (ph).

20 MS. BURNBALM: Thank you.

21 MR. KARP: Uh-huh. I will try to keep
22 my opening remarks brief, Your Honor, and I'll try not
23 to repeat each of the points raised by Mr. Seeger.

24 THE COURT: Okay. Thank you.

25 MR. KARP: Although I will repeat the

1 point raised at the outset by Mr. Seeger that the NFL
2 believes too that this is an historic settlement.

3 The proposed settlement provides
4 substantial and monetary compensation, indeed
5 unprecedented monetary compensation up to \$5 million
6 per player for retired NFL players who develop
7 significant neurocognitive and neuromuscular
8 impairments associated with specific diseases and
9 specific conditions.

10 The proposed settlement provides the
11 substantial monetary awards without requiring any
12 showing whatsoever of causation. In other words,
13 there is no requirement that players prove that
14 playing in the NFL caused their impairments.

15 The settlement program runs for 65
16 years, a period of time sufficient to cover each of
17 the 22,000 plus retired players.

18 The monetary awards are inflation
19 protected.

20 The NFL has guaranteed payment of full
21 compensation to every eligible retired player over the
22 life of the settlement, and the NFL's ultimate
23 liability is uncapped.

24 In addition to these uncapped,
25 inflation protected, substantial monetary awards the

1 proposed settlement also includes a comprehensive
2 program of baseline neurocognitive testing. This
3 program to be funded entirely by the NFL provides
4 therapy, treatment, and medicine to NFL players who
5 show early signs of neurocognitive decline, and it
6 will help NFL retired players and their families
7 understand the player's current level of cognitive
8 functioning.

9 I want to emphasize, Your Honor, that
10 these monetary compensation awards and these
11 supplemental benefits are on top of the NFL's existing
12 health benefits and disability programs, programs that
13 have been collectively bargained and that will remain
14 in full force and full effect.

15 As part of this settlement the NFL has
16 agreed not to seek offsets and not to seek reductions
17 for payments made to NFL players under these programs.

18 And finally, as Mr. Seeger noted, the
19 proposed settlement establishes an education fund
20 which will be funded by the NFL and overseen by this
21 Court. That fund will support safety and injury
22 protection programs at all levels of football and will
23 educate retired NFL players about the NFL's existing
24 medical and disability benefit programs.

25 The NFL is proud of this settlement.

1 THE COURT: One second before you go on
2 about the education fund you know there has been a
3 good deal of criticism sipray (ph), and I've been
4 criticized for allowing certain sipray conditions.
5 Would you consider this sipray?

6 MR. KARP: No, this is an independent
7 part of the settlement that is funded separately and
8 distinct from the BAP program and from the monetary
9 award program, and under the Third Circuit's decision
10 in Baby Products it is not a sipray issue, and we
11 discuss that in our brief pages 139 to 141.

12 Again, Your Honor, the NFL is proud of
13 this settlement.

14 In entering into it the league put
15 aside its very strong legal and factual defenses and
16 we agreed not to litigate. Instead, as Your Honor is
17 aware, we focused on negotiating a settlement that
18 would provide substantial compensation and other
19 critical benefits to retired players and years and
20 years and years sooner than would have been possible
21 in a litigated context.

22 And it's important to keep in mind --
23 and this has been missing from the public debate --
24 that the NFL had a fundamental choice to make in this
25 matter. The league could have fought these claims,

1 successfully fought these claims in my view for many,
2 many years. But as Your Honor observed in your
3 July 14th preliminary approval decision, and as
4 Mr. Seeger stressed in his opening remarks, the league
5 has several powerful -- indeed the league had several
6 dispositive legal and factual defenses to the claims
7 asserted by plaintiffs. The objectors entirely ignore
8 this reality and this context in their extensive
9 papers.

10 I don't want to belabor this point, but
11 I would like to provide some context here.

12 This settlement cannot be viewed in a
13 vacuum as the objectors and as many in the media have
14 attempted.

15 The NFL, as you heard a few moment ago,
16 has a significant pending motion before this Court
17 that these cases should be dismissed at the very
18 outset because the underlying claims asserted by the
19 plaintiffs are governed by the players' collective
20 bargaining agreements with the NFL and therefore are
21 preempted by federal labor law.

22 As Mr. Seeger noted while this Court
23 has not yet decided the NFL's preemption motion,
24 numerous courts around the country have and they have
25 agreed with the NFL's position.

1 This single threshold issue posing
2 enormous risks to retired players, risks that have
3 been entirely ignored by the objectors in their
4 papers. And the challenge is that plaintiffs would
5 face in this litigation, as Your Honor is aware and as
6 Your Honor wrote, extend far, far beyond preemption.

7 For example, even if some of these
8 cases survived a preemption ruling plaintiffs would
9 still face numerous substantial legal and factual
10 hurdles that would likely result in the dismissal of
11 their claims, if not at the outset of litigation, most
12 certainly before trial.

13 These defenses include statutes of
14 limitation, assumption of risk, causation, the lack of
15 any factual support for plaintiffs' claim of
16 concealment, and on and on and on. These defenses are
17 outlined in some detail in our brief asking this Court
18 to grant final approval. The objectors entirely
19 ignore the existence of all of these defenses and the
20 huge risks they pose for plaintiffs.

21 The proposed settlement agreed to by
22 the NFL eliminates not only the very significant risks
23 of defeat for the retired players, but also the huge
24 cost to all retired players of years and years of
25 contested litigation.

1 To put this in perspective consider if
2 you will the reality of how this would play out in the
3 absence of a settlement. Absent a settlement
4 currently symptomatic retirees, if their claims
5 somehow were to survive preemption, would be required
6 to spend many years and many, many millions of dollars
7 in legal fees litigating highly uncertain claims that
8 likely in our view would leave them empty handed in
9 the end.

10 And absent a settlement currently
11 asymptomatic retirees, if their claims were to somehow
12 survive preemption, would face an uncertain future
13 knowing that if they ever developed a significant
14 neurocognitive or significant neuromuscular impairment
15 they would then, and only then, need to embark on a
16 protracted and expensive litigation with the odds
17 stacked decidedly against any recovery.

18 The proposed settlement before Your
19 Honor entirely eliminates all of these very
20 substantial risks. It provides all retired players,
21 whether symptomatic or asymptomatic, with the peace of
22 mind that substantial monetary compensation and other
23 substantial benefits will be available if and when
24 they are needed without any risk and without any
25 uncertainty.

1 What has been lost in the fog of the
2 objections is that the league chose to do the right
3 thing here. It agreed to put aside its substantial
4 factual and legal defenses to work with plaintiffs
5 under the supervision of this Court, the mediator, and
6 the court-appointed Special Master Perry Golkin, to
7 negotiate the consensual resolution that provides
8 substantial monetary compensation and substantial
9 other benefits to retired NFL players and to their
10 families.

11 The settlement provides this
12 compensation and these benefits to those who are most
13 deserving and most in need of immediate help, and
14 critically it provides this compensation and these
15 benefits many, many years sooner than would have been
16 possible through a protracted and bitterly contested
17 litigation.

18 The product of this year-long effort is
19 the proposed settlement pending before Your Honor.

20 For all the reasons set forth in our
21 extensive papers and supported by our medical and
22 expert declarations we submit that the proposed
23 settlement is fair, reasonable, and adequate under
24 well-settled law in this circuit.

25 First the settlement is fair,

1 reasonable, and adequate in absolute terms for the
2 reasons I've outlined, but just as important and
3 conspicuously absent from the broad public debate and
4 from the lengthy papers submitted by the objectors,
5 this settlement is manifestly fair, reasonable, and
6 adequate when one evaluates it in context.

7 In other words, how would the retired
8 players fair if they actually were to litigate these
9 cases? What relief would the retired players likely
10 secure five years or ten years from now if they
11 litigated these claims against the National Football
12 League?

13 Fair, reasonable, and adequate as
14 compared to the alternatives. That is the appropriate
15 inquiry. That analysis is entirely missing from the
16 public debate and from the objectors' papers.

17 I submit, Your Honor, that the proposed
18 settlement is measurably superior for the retired
19 players than the likely outcome of a protracted and
20 expensive litigation.

21 And of course as Mr. Seeger pointed
22 out, and as Your Honor knows only too well, any
23 retired player in the settlement class who believes
24 differently was free to opt out of the settlement and
25 free to pursue a litigation against the National

1 Football League.

2 At the end of the day this Court need
3 not accept my word and this Court need not accept Mr.
4 Seeger's word that the settlement is fair, reasonable,
5 and adequate. We urge the Court to consider the
6 overwhelmingly positive reaction from the 22,000 plus
7 retired players in the settlement class. They have
8 spoken clearly, they have spoken loudly, and they have
9 spoken unambiguously.

10 Under Third Circuit law, as Your Honor
11 knows, the reaction of directly affected class members
12 is persuasive evidence of a settlement's fairness,
13 reasonableness, and adequacy, and that is especially
14 true in this case.

15 And why do I say that? It is not
16 overstatement or hyperbole, Your Honor, to suggest
17 that the proposed settlement in this case has been
18 scrutinized and dissected more closely, more
19 relentlessly, and more publicly than any class
20 settlement in history.

21 The debate over its terms has been
22 widespread, it has been intense, and it has been
23 uniquely public.

24 The media presence here today is
25 emblematic of the unprecedented level of public

1 scrutiny that this settlement has attracted. And I'm
2 not only referring to scrutiny by the media, numerous
3 experienced and well-funded attorneys have vehemently
4 and publicly criticized the deal and campaigned
5 relentlessly to try to persuade class members to opt
6 out of the settlement class even creating websites to
7 do so.

8 Several of them are here today in this
9 courtroom, Your Honor, and they have been supported in
10 this effort by powerful voices in the media who have
11 wanted for their own purposes to see this settlement
12 fail.

13 But notwithstanding this unprecedented
14 level of scrutiny and these concerted efforts to
15 induce opt outs, more than 99 percent of the 22,000
16 plus class members have endorsed this settlement and
17 have decided to remain in the class. More than 99
18 percent of the class members support this settlement.

19 Why have the retired players supported
20 this settlement so overwhelmingly? There's several
21 reasons.

22 First, they recognize that the
23 settlement provides very substantial monetary and very
24 substantial other benefits.

25 Second, they recognize that the

1 settlement provides these monetary payments and other
2 benefits promptly, consistently, and fairly.

3 And third, and perhaps most important,
4 they recognize that this settlement will spare
5 thousands of retirees and their families the severe
6 financial and emotional cost, not to mention the very
7 substantial risk of defeat, associated with years and
8 years of litigation.

9 Nor we submit, Your Honor, should this
10 overwhelming showing of support be the least bit
11 surprising.

12 This settlement has been carefully
13 structured by the parties under the supervision of
14 this Court, the mediator, and the court-appointed
15 special master to be as fair as possible. Thus the
16 baseline assessment program provides class members
17 with a comprehensive program of neurocognitive testing
18 and related medical benefits funded by the NFL.

19 The monetary payments as noted up to
20 \$5 million per player will be made to retired players
21 who present medical evidence of qualifying diagnoses
22 without requiring these players to make any showing
23 whatsoever of causation. These diagnoses will be made
24 by qualified independent doctors working with the
25 settlement administrator appointed by this Court.

1 The offsets contained in the settlement
2 for age of diagnosis and for years played are
3 appropriate proxies for both causation and exposure
4 and are fully supported by established medical
5 science.

6 The awards are inflation protected.

7 The agreement provides for adequate
8 security of future payments, and the NFL's ultimate
9 liability in this settlement is uncapped. A point
10 that we appreciate was very important to Your Honor.

11 This overwhelming nearly unanimous show
12 of support by the class members themselves powerfully
13 underscores the fairness, reasonableness, and adequacy
14 of the proposed settlement.

15 You'll hear next from the objectors,
16 Your Honor, and I would like to note that the
17 objections before this Court are entirely typical of
18 objections seen in settlements of this type.

19 The objections are directed primarily
20 at attempting to increase for select categories or
21 groupings of retired players the already generous
22 awards provided by the settlement.

23 The objections, in our view, and as
24 laid out in our briefs, are entirely without merits.

25 And of course once again, Your Honor,

1 any retired player in the class who believed that the
2 awards should have been greater or the categories of
3 compensable conditions broader, or the procedural
4 protections more lax, or the applicable offsets more
5 modest, any player in the class was free to opt out of
6 the settlement and to pursue his own litigation
7 against the NFL.

8 There is certainly a have their cake
9 and eat it too aroma to these objections.

10 We'll respond to the specific
11 objections later this afternoon, but I'd like to spend
12 just a moment, if I may, Your Honor, addressing the
13 headline objection that the settlement does not cover
14 CTE.

15 That objection, as Your Honor know
16 doubt is aware, has received a great deal of public
17 attention, but that objection and the reporting of
18 that objection reflects a fundamental, if not a
19 deliberate, misunderstanding of this settlement, how
20 it works, and its scope.

21 As is crystal clear from its terms, and
22 Mr. Seeger made this point in his opening remarks,
23 this settlement compensates retired players who were
24 diagnosed with severe neurocognitive and neuromuscular
25 impairments.

1 As such, this settlement expressly does
2 compensate the significant neurocognitive and
3 neuromuscular impairments that allegedly are
4 associated with CTE, such as memory loss, such as loss
5 of executive function, such as attention difficulties,
6 such as loss of spatial and reasoning skills.

7 The objectors' suggestion that this
8 settlement does not cover CTE is not only not true,
9 but we submit that it is a deliberate effort to
10 mislead this Court and to mislead class members, an
11 effort that I might add has failed spectacularly since
12 99 percent plus of the class members did not fall for
13 it and now support the settlement.

14 The other CTE-related objection that
15 the settlement does not compensate mood disorder and
16 depression allegedly associated with CTE, likewise
17 reflects a fundamental misunderstanding of this
18 settlement and of settlement negotiations more
19 generally.

20 Mood disorders and depression are not
21 compensated under this settlement for a very simple
22 reason. These conditions are widely distributed
23 across the general population and have more proven
24 causes that have nothing in the world to do with
25 football and with CTE.

1 The fact that this settlement draws
2 lines on compensable conditions at various levels of
3 severity is entirely reasonable, entirely fair, and
4 frankly entirely predictable.

5 Every settlement of this type on
6 record, every single one does exactly the same thing,
7 and courts in this circuit, and for that matter courts
8 in every circuit in this nation, have found such line
9 drawing to be an appropriate and inevitable product of
10 arms length negotiations between experienced
11 plaintiffs' counsel and experienced defense counsel.

12 And, Your Honor, I would add again,
13 that any retired players who believed that mood
14 disorders or depression should be a compensable
15 condition was free to opt out of this litigation and
16 pursue those claims in a litigation against the NFL.

17 The fact again that more than 99
18 percent of the retired players chose to support this
19 settlement, perhaps the most publicly covered
20 settlement in history, speaks volumes about what they
21 and about what objectors' counsel really think about
22 the legal bona fides and the value of these claims.

23 Let me touch upon very briefly, if I
24 may, Your Honor, the objectors' other complaints.

25 For example, the reductions and offsets

1 contained in the settlement for age of diagnosis and
2 seasons played. They are entirely appropriate proxies
3 for causation and for exposure and are fully supported
4 by established medical and scientific science --
5 evidence.

6 Everyone in the medical and scientific
7 community, and in that regard I do mean everyone,
8 agrees that neurocognitive and neuromuscular decline
9 increases as one ages for reasons entirely dependent
10 of playing football. And it makes good sense to use
11 the amount of time played in the National Football
12 League as a proxy for alleged exposure to repetitive
13 concussive and sub-concussive events, which happens to
14 be the common allegation in all of these cases.

15 Finally the objection that the proposed
16 settlement imposes unfair administrative burdens on
17 retired players is particularly difficult to
18 understand. Again, Your Honor, we urge you to
19 consider the reality here.

20 This settlement requires retired
21 players to do no more than to secure a diagnosis of an
22 eligible compensable condition from a roster of
23 qualified independent doctors and to submit that
24 diagnosis with supporting documentation to the court-
25 appointed claims administrator. That's it. That's

1 all they're required to do. A retired player seeking
2 millions of dollars of monetary benefits can hardly be
3 heard to object to that process. And the NFL, which
4 has agreed to pay these substantial monetary awards
5 without any cap on its total liability, is surely
6 entitled to a claims process that is fair and that is
7 structured to be untainted by fraud and unaffected by
8 abuse.

9 I fully appreciate Your Honor that the
10 objectors and some of the retired players would like
11 this settlement to be even richer, even more generous
12 than it is, that is true as Your Honor who's
13 experienced well knows in every settlement on record.

14 And I appreciate that the retired
15 players and some of the objectors would like the
16 settlement to cover every physical and every
17 psychological condition under the sun, and I
18 appreciate that some retired players and some in media
19 have decided to blame professional football for a
20 broad, broad catalog of evils and frustrations.

21 Perhaps all of this is understandable,
22 perhaps it's not, but in the end however we ought not
23 lose sight of the fact that this Court is being asked
24 to evaluate a particular settlement, one that was
25 negotiated at arms length by the parties, one that was

1 later revised to take into account specific concerns
2 raised by this Court and by Mr. Golkin.

3 No one in good faith can deny that the
4 settlement pending before this Court provides
5 substantial benefits and substantial other relief to
6 retired NFL players or that it provides retired
7 players with an outcome far, far superior to what they
8 likely would achieve through a protracted and costly
9 litigation against the NFL. More than 99 percent of
10 the class members have already publicly acknowledged
11 as much.

12 Viewed as it must be through the prism
13 of this circuit's precedent we submit this settlement
14 undeniably is fair, that it undeniably is reasonable,
15 that it undeniably is adequate, and we urge its final
16 approval.

17 But before I sit down, Your Honor, I
18 would like to thank this Court for its extraordinary
19 efforts superintending this very complicated MDL
20 litigation and for closely supervising this settlement
21 progress, and for allowing the parties to enlist
22 retired Federal District Judge Lane Phillips as
23 mediator and for involving Special Master Perry Golkin
24 in these settlement efforts.

25 As you heard from Mr. Seeger and as you

1 yours know only too well, negotiating this settlement
2 was an extraordinarily challenging, complicated, and
3 daunting undertaking. This historic agreement would
4 not have been possible without the commitment,
5 dedication, patience, and judgment provided by Your
6 Honor throughout this process.

7 I thank you very much, Judge Brody.

8 THE COURT: All right. Thank you.
9 Okay. What we have decided to do is to take a ten-
10 minute recess, and then Mr. Molo, you will begin.

11 MR. MOLO: Yes, Your Honor.

12 THE COURT: Okay? And then we'll have
13 lunch when the judge gets hungry? No, when you
14 finish.

15 (Laughter)

16 THE COURT: Okay. Court is recessed
17 until 25 after 11:00.

18 (Recessed at 11:12 a.m.; reconvened at 11:22
19 a.m.)

20 THE CLERK: Be seated, everyone.

21 THE COURT: My goodness I've been a
22 judge for 33 years and I never had to use a gavel.

23 (Laughter)

24 THE COURT: Okay. You don't have to
25 stand. Once a day is enough. Thanks.

1 We'll wait a second, just wait until
2 everybody comes back in. There are a lot of people in
3 the courtroom.

4 (Pause)

5 THE COURT: Steven Molo; is that
6 correct?

7 MR. MOLO: That's correct, Judge.

8 THE COURT: Okay. You may begin.

9 MR. MOLO: Good morning, Your Honor.

10 THE COURT: Good morning.

11 MR. MOLO: Thank you for --

12 THE COURT: It's still morning. Wow.

13 MR. MOLO: It's still morning. Thank
14 you --

15 THE COURT: Okay.

16 MR. MOLO: -- for giving me the
17 opportunity to address the Court and for the other
18 objectors to address the Court as well.

19 Since Mr. Karp got to introduce his
20 team I can't go back to New York without introducing
21 mine.

22 THE COURT: Okay.

23 MR. MOLO: So in addition to
24 Mr. Weigand and Mr. Totaro, who are over there to my
25 right, I have the skilled, abled Philadelphia,

1 Mr. Hangley with me at counsel table, and then seated
2 with me are Kaitlin O'Donnell, Eric Nitz, and Ray
3 Hashem from my office.

4 THE COURT: Okay. Thank you.

5 MR. MOLO: And Mr. Moore who is one of
6 the original objectors in the case and he happens to
7 be here as well.

8 Your Honor, I think -- I just want to
9 be absolutely clear up front, we want a settlement.
10 There's no question we want a settlement. I agree
11 with much of what was said by Mr. Karp and Mr. Seeger;
12 however, we want a settlement that is fair, adequate,
13 and reasonable. And the settlement that before the
14 Court today is not that.

15 I think it's important to understand
16 the settlement is a compromise, yes, but a compromise
17 of what? What were the nature of these very claims
18 here that are being put to rest as a result of this
19 settlement?

20 The allegations were fraud. Fraud of
21 the most serious kind. Not out of someone's -- the
22 plaintiffs weren't defrauded out of their money,
23 that's not what they alleged, they were alleging that
24 they were defrauded out of their health with all the
25 consequences that has not just to them but to their

1 families, to their girlfriends, to their wives, to all
2 those around them.

3 And yes, the plaintiffs face
4 significant obstacles and the settlement allows them
5 to avoid those risks, but the NFL avoids pretty
6 significant risks here too in this settlement. They
7 avoid the risk of having to pay billions of dollars in
8 damages, not just compensatory damages, but possibly
9 punitive damages.

10 They avoid the risk of having to go
11 through discovery. There's been no discovery in this
12 case. It's extraordinary that a settlement of this
13 nature would be reached without any discovery, and
14 there's been no disclosure by class counsel of any
15 informal discovery.

16 So the NFL avoids, if the allegations
17 that class counsel have put forth are to be true,
18 producing evidence that they in fact sponsor junk
19 science, that they affirmatively lied to their
20 players, all in the name of corporate profit.

21 The choice, contrary to what Mr. Karp
22 says, isn't just opt out if you don't like the
23 settlement, the choice is to have a settlement that is
24 legally sufficient or to opt out. And this Court is
25 well aware and has very carefully undertaken its duty

1 to be the safeguard of that class.

2 I'm going to address three primary
3 issues. I'm not going to address every issue that
4 Mr. Seeger raised, I'm not going address every issue
5 Mr. Karp raised. As Your Honor is well aware other
6 counsel will be speaking. I'm going to address the
7 issue that you directed me to first and foremost,
8 which is CTE, and how the release of the CTE claims,
9 while compensating only a small percentage of the CTE
10 cases in this case, renders the settlement in and of
11 itself unfair.

12 Secondly, I'm going to address
13 conflicts within the class, specifically with respect
14 to the treatment of CTE, and also with respect to the
15 treatment of players who played in the NFL Europe.

16 And third, I'm going to address the
17 deficient notice in this case.

18 Those issues all raise issues not just
19 of questions of the Federal Rules of Civil Procedure
20 but of constitutional magnitude.

21 Mr. Totaro is going address the issue
22 of defects and claims process, and Mr. Weigand will
23 address the problems with testing.

24 I think it's very helpful to start with
25 the legal framework on the issues that I raise,

1 because I don't disagree with most of the analysis
2 under the Girsh factors.

3 The first point on the legal factors --
4 if we could pull up the first slide, please, Josh.

5 THE COURT: Okay.

6 MR. MOLO: Okay. The law is clear that
7 denial of final approval is appropriate where a
8 settlement treats similarly situated class members
9 differently or where the settlement releases claims of
10 the parties who receive no compensation in the
11 settlement. It's Third Circuit law and it comes
12 straight from the manual for complex litigation.

13 Does the release -- is the release
14 justified, are parties in fact being compensated in
15 exchange for giving that release? And then what does
16 the release say here?

17 The release here -- if you would -- is
18 peculiarly both very broad and very specific. And I
19 have a stack here if this would be beneficial.

20 THE COURT: No, I can see it.

21 MR. MOLO: Okay.

22 THE COURT: It's okay. Thank you.

23 MR. MOLO: It's an unusual release in
24 that it's both broad and specific. As Your Honor can
25 see it says, "The class members waive and forever

1 discharge and hold harmless the released parties from
2 any and all past, present, and future claims," then it
3 talks generally about claims arising out of or
4 relating to brain or cognitive injury, but then
5 specifically -- specifically it says, "Arising out of
6 or relating to CTE."

7 So what is CTE and what is this disease
8 that this release applies to? Oddly enough we're
9 largely in agreement, the experts they submitted 11
10 affidavits I think it was a week ago, it might be more
11 than that from a host of people, I submitted
12 affidavits from 2 of the most prominent people in this
13 field, Dr. Stern and Dr. Gandy. Dr. Stern is at the
14 BU Center for CTE at Boston University Medical Center.
15 Dr. Gandy is at Mount Sinai.

16 And I want to add, Judge, both of those
17 doctors submitted those affidavits without any charge
18 because they feel so strongly about the wrongness of
19 this settlement. And before we're done today I would
20 appreciate it if the Court would require plaintiffs'
21 counsel and class counsel to disclose the financial
22 interests and arrangements between their experts, the
23 monies that was paid to their experts, as well as the
24 arrangements, there was one or two experts that said
25 we weren't paid, but their programs were funded by the

1 NFL.

2 What is CTE? If you look here at the
3 brain it's a hideous, hideous disease. Up on top is a
4 healthy brain, on the bottom we see a diseased brain
5 with CTE. Just physically they look different. It's
6 a progressive degenerative disease in people who have
7 suffered repetitive brain trauma, and that's
8 repetitive brain trauma whether you've received a
9 concussion or whether it's sub-concussive.

10 And again, you see the agreement and
11 the objectors between Dr. Gandy and class counsels'
12 expert (indiscernible - 11:29:20) there was an
13 agreement there between the class counsels' expert and
14 the objectors' expert.

15 How does this CTE actually -- how does
16 a brain come to look like that? There are actually
17 specific definitive scientific methods for detecting
18 it as we can see on the next slide.

19 If you look to the left, Judge, you'll
20 see these little clusters and dots, and we can't see
21 -- okay. Okay. And those little clusters and dots
22 indicate what they call tau tangles. There is a
23 protein called the tau protein, and when it forms in
24 certain patterns in the brain that is in effect the
25 symptom or a sign of CTE. That is CTE. If you look

1 to the right a healthy brain doesn't have those tau
2 tangles, to the left CTE does. And again, there's
3 agreement between the parties to that.

4 Now CTE has some very -- if you can go
5 to the next , please -- interesting things. In
6 contrast to Alzheimer, Parkinson --

7 THE COURT: No, no, may I have the --
8 let me have --

9 MR. MOLO: Sure.

10 THE COURT: -- what you -- what I --

11 MR. MOLO: Sure.

12 THE COURT: -- the first time said I
13 was not interested in seeing. It's difficult for me
14 to see it.

15 MR. MOLO: What's interesting about CTE
16 as it relates to this case, and it's interesting
17 because it relates to something that Mr. Karp said and
18 Mr. Seeger did as well, CTE requires repetitive head
19 trauma. In other words, you can't get CTE without
20 being hit in the head and repeatedly.

21 In contrast Alzheimer, Parkinson's,
22 ALS, and CTE all can be found in the general
23 population. And when they talk about well we can't
24 compensate mood disorders because -- or depression
25 because depression is found in the general population,

1 Alzheimer, Parkinson's, ALS are all found in the
2 general population, and unfortunately many of us here
3 know people who never played football who contracted
4 those diseases. And that's why it's been termed --
5 CTE has been termed in the popular presses the
6 industrial disease of football.

7 Now much has been made of the inability
8 to diagnose CTE only post-mortem, and that is true
9 that a definitive -- absolutely definitive diagnosis
10 of CTE only comes on an autopsy of a person's brain
11 and the research on a person's brain where those
12 microscopic slides are formed and then they're able to
13 analyze the tau proteins.

14 But, Judge, it's true also that there's
15 a great deal of imprecision about the diagnoses of
16 these other forms of neurological disease as well.

17 Alzheimer while people say so and so,
18 my aunt, my friend has Alzheimer, often it's not such
19 a definitive diagnosis. In those diagnoses frequently
20 most instances can't be definitively formed until the
21 person has unfortunately died and there's an
22 examination of their brain.

23 Now, I will say that the science today
24 to diagnose Alzheimer and Parkinson's and ALS in
25 people who are alive is farther advanced than it is in

1 CTE, but we are very, very close on CTE.

2 Within the next five to ten years, as
3 Dr. Stern has stated in his affidavit, there'll be
4 highly accurate, clinically accepted methods to
5 diagnose CTE to a great certainty. And obviously
6 Dr. Stern says that, but in addition class counsels'
7 own expert says this. This clinic that they have at
8 UCLA, which is doing these -- this research now, there
9 are players being told that they have CTE. And I'll
10 come to that in a moment.

11 So -- and there's an eye clinic in
12 Chicago. We cite all of this in our papers.

13 And contrary to what Mr. Karp says
14 about the science, Anchem clearly teaches -- Anchem
15 clearly teaches that you cannot freeze science in
16 place. A settlement has to account for the
17 development of science, especially when we're talking
18 about a situation like this.

19 Now one of the class -- the -- that's
20 the science of CTE in an overview.

21 I want to talk now about how CTE
22 actually manifests itself and the symptoms. What is
23 CTE to a person that has it? And it displays itself
24 in four stages, Judge. Can we go to the first stage?

25 Stage 1 CTE -- is it possible to get

1 that a little bit cleaner on the screen? Stage 1 CTE,
2 and Judge, this is on page 8 of the overall chart of
3 your -- of your book. But people at Stage 1 are
4 suffering from short-term memory difficulties,
5 executive dysfunction, loss of attention and
6 concentration, explosivity, and aggression. And, you
7 know, unfortunately we have seen these reports of
8 domestic abuse and domestic violence to the NFL, and
9 CTE is unquestionably a factor in that. It does not
10 excuse the behavior, I'm not suggesting for a moment
11 it does, but we would be all ignoring the science and
12 the most important people who are speaking on this
13 issue to say that having CTE and having a violent and
14 explosive and an aggressive personality and behavior
15 are unrelated.

16 In addition to that and what is
17 extraordinary is at its earliest stages, at Stage 1
18 CTE manifests, one of the symptoms is suicidality.
19 Suicidality.

20 And interestingly enough suicidality
21 does not present in Parkinson's, it does not present
22 in Alzheimer, it does not present in ALS, but
23 suicidality presents in CTE and at its very earliest
24 stages.

25 When you move to Stage 2 CTE, and it

1 does progress, and if you have CTE you will progress
2 for all four stages if you live long enough -- if you
3 live long enough, and many people don't.

4 At the second stage, in addition to the
5 things that I mentioned, the short-term memory loss,
6 again the explosivity and aggression, impulsivity and
7 mood swings develop, and again the suicidality is
8 present.

9 At Stage 3. At Stage 3 -- Stage 1 had
10 short-term memory loss and difficulty, Stage 2 short-
11 term memory loss. At Stage 3 we finally see memory
12 loss with mild dementia. At Stage 3 CTE. And at
13 Stage 3 --

14 THE COURT: How -- this is -- all comes
15 from this McKee (ph) report, is that what this --

16 MR. MOLO: This is from the McKee
17 report.

18 THE COURT: But how do they -- but what
19 was their evidence of that?

20 MR. MOLO: Well they are -- I mean
21 Dr. Stern and -- has put forth an affidavit they have
22 done, BU has put forth the most -- and this is not
23 controverted by the other side.

24 THE COURT: But now that you have CTE
25 only after death I don't quite understand how you can

1 come to conclusions about Stage 1, Stage 2, and
2 Stage 3. Are you asking families, is that what you're
3 doing?

4 MR. MOLO: They have gone back and
5 interviewed -- they have interviewed family members
6 and they have gone through and dealt with this, and
7 this is not just the people at BU, there's people at
8 UCLA and other people around the country that are
9 studying this.

10 THE COURT: Well right now you cite
11 McKee, but I read that -- I read -- is it a she? Yes.
12 I read her submissions -- her submissions of
13 scientific papers and it says that the only way they
14 know about this is that they asked family members.

15 MR. MOLO: Correct.

16 THE COURT: So family members are
17 making a decision about Stage 1, Stage 2, Stage 3?

18 MR. MOLO: No, family members are not,
19 Judge. The family members are providing information
20 to train scientists who do this very thing, and in
21 doing this very thing this is -- the study as to how
22 these symptoms display themselves, and it is only at
23 stage 4 that we see that CTE evolves to severe memory
24 loss with dementia, again, with the explosivity, the
25 aggression, suicidality, and paranoia.

1 I'm telling you that CTE is linked to
2 playing in the NFL and that CTE is the industrial
3 disease of the NFL, but I'm not the only person who is
4 before this Court who's told you that and who believes
5 that.

6 Let's start with where it appears in
7 the class complaint. They specifically allege:

8 "That for decades the NFL has been
9 aware of paragraph 89 that multiple blows to the head
10 can lead to long-term brain injury, including, but not
11 limited to, memory loss, dementia, depression, and CTE
12 and related symptoms."

13 That allegation was made by this cadre
14 of lawyers that Mr. Seeger talked about this morning,
15 these people who had settled billions of dollars of
16 claims, were the world's leading experts in bringing
17 claims on injuries like this, and after their studied
18 view of this case, after their great detailed study
19 and their analysis and their research they put their
20 names to a complaint in which this was the allegation
21 that was made. And you know what, they were right to
22 do so, because the science supports it.

23 If you go to the next slide we'll see
24 what BU did. You know, BU has the leading center on
25 the study of CTE, and in 2013 they published the study

1 in Brain Journal, which is the leading journal in
2 neurology, and in that study it showed that 34 of 35
3 deceased professional players were diagnosed with CTE,
4 and that slide says deceased professional players
5 because one of them happened to not play in the NFL,
6 he played in the Canadian Football League.

7 That research was recently updated, not
8 in a paper, but they've announced that research was
9 updated, and the 2014 research shows that 76 of 79
10 deceased NFL players have been diagnosed with CTE
11 post-mortem.

12 So again, the allegation that was made
13 linking CTE to the NFL is supported by the science.

14 Lastly, what has class counsel said
15 throughout this litigation up until just recently?

16 Mr. Seeger on his own website told the world:

17 "that multiple medical studies have
18 found direct correlation between football and
19 concussions and suffering from symptoms of chronic
20 traumatic encephalopathy, also known as CTE.

21 CTE is believed to be the most serious
22 and most harmful disease that results from the NFL on
23 concussions."

24 That was on his website until the day
25 after the argument in the Third Circuit when it raised

1 it at the Third Circuit, then it came down.

2 So for all of their experience, for all
3 of their research, for all of their work on the case
4 up until whatever it was, six weeks ago, eight weeks
5 ago, plaintiffs' counsel was telling the world that
6 CTE is believed to be the most serious and harmful
7 disease that results from the NFL and concussions.

8 So what does a player that is living
9 with CTE now after July 7th of 2014 get for having
10 CTE, the most serious and harmful disease? Gets zero.
11 Gets zero. Mr. Seeger's declaration at paragraph 37
12 says it, the NFL's brief at paragraph 78 -- at page 78
13 says it. CTE is not compensated in the living, it is
14 simply not compensated.

15 Now, I've heard about -- we heard a
16 little bit today and we've seen it in the papers that
17 they said, well really it's not CTE, even though we're
18 compensating Parkinson's, ALS, Alzheimer because those
19 are diseases that are more readily, not to 100 percent
20 certainty necessarily, but more readily diagnosable
21 right now ARE people that are living we're going to
22 give them actual cash awards. But the CTE people are
23 really sort of taken care of any way. And let's see
24 how that works out.

25 Well the compensation that they're

1 referring to, death with CTE before July 7th of 2014,
2 which they valued with a maximum award of \$4 million,
3 so they're saying that CTE has a value, as they
4 should, but if you were diagnosed with CTE at Stage 1,
5 Stage 2, Stage 3, or Stage 4 you could get up to a
6 \$4 million award for any of those stages.

7 Now this sort of sloppy after the fact
8 argument to sort of apologizing and address the very
9 obvious issue that CTE is not compensated, they say,
10 well really they're compensated with CTE through
11 dementia. But how would that occur? Well you could
12 have CTE at Stage 1 or 2 and not have dementia, and in
13 that case you die with it, it could be diagnosed in
14 your brain, just like the people who died before
15 July 7th of 2014 have that same definitive post-mortem
16 diagnosis and they get nothing. They get nothing.
17 But if you have Stage 3 or 4 and you might -- and you
18 die also by the way just the after fact diagnosis
19 you're not going to get anything even though it's
20 definitive.

21 But the argument that's being made is
22 that the way that CTE victims get somehow compensated
23 through this settlement is that they get to go through
24 the claims process, which we're going to talk about
25 the problems with that in a moment, have that

1 uncertainty of the claims process, and then -- and
2 then if after going through the claims process there
3 is a determination -- and I'm not even going to call
4 it a diagnosis -- but a determination of dementia 1.5,
5 because it's not really in the medical literature,
6 something called dementia 1.5, they could get a
7 maximum award of up to 1.5 million. And similarly if
8 you get a diagnose or a determination of dementia at
9 2.0 you could get up to a \$3 million award.

10 So compensation for dementia simply
11 does not equal compensation for CTE.

12 Now there was a statement made by
13 Mr. Klonoff, one of the affiants at paragraph 86 where
14 he makes what I consider to be quite a remarkable
15 statement and one that has been muddled around in the
16 press and has come -- been attributed to various
17 people on the plaintiffs' side of this case, is the
18 reason we didn't provide a benefit for CTE in people
19 after July 7th of 2014 is that would somehow
20 incentivize people to commit suicide.

21 Well if you were really interested in
22 addressing suicidality among players who were the
23 victims of this disease that you class counsel had
24 researched with all of your resources and experience
25 and have alleged in the complaint and proclaimed to

1 the world and in website, why didn't you do something,
2 why didn't you build something into the settlement
3 that would deal with the issue of suicide when people
4 were suffering from CTE at Stage 1 or 2, not the
5 mention 3 or 4?

6 I mean I believe that that statement
7 and that argument is an insult, it's an absolute
8 insult to the memory of the players who have taken
9 their lives and who under the scheme of this
10 settlement would never have been compensated or their
11 families would not be compensated, even though they're
12 suffering from this hideous disease.

13 Now the CTE sets up in a different way
14 in addition to just that alone the inadequacy and the
15 failure to compensate CTE is enough to find this
16 settlement unfair and inadequate.

17 Additionally, Judge, there are
18 intraclass conflicts, and again, we're not just
19 talking about leaving out a disease, we're not talking
20 about line drawing, we're talking about the disease
21 that is most central and the one that is only
22 exclusively obtained through contact in the head being
23 left out of the settlement. There's a release without
24 compensation for those people, but they did provide
25 some compensation, there is some CTE compensation, and

1 that CTE compensation is for people who died with CTE
2 before July 7th of 2014. As I said, the award that
3 those people may get would be up to -- up to
4 \$4 million.

5 The issue here is are the class
6 representatives -- the Third Circuit deals with the
7 this issue, which is really under Rule 23(a)(4) about
8 adequacy of representation, intraclass conflicts
9 within Third Circuit law is addressed through the
10 issue of adequacy of representations.

11 The class representatives failed to
12 fairly and adequately represent the interest of the
13 class, and the adequacy requirement here, the lynchpin
14 of the adequacy requirement is the alignment of the
15 interests and the incentives between the
16 representative plaintiffs and the class. The
17 alignment of the interests and the incentives between
18 the representative interests of the class, the rest of
19 the class.

20 What did the -- what did the class
21 members here allege? The representative class members
22 do not allege -- and I believe it's paragraph 4 for
23 Mr. Wooden and paragraph 7 for Mr. Turner -- they do
24 not allege they have or at risk of having CTE, they do
25 not allege that they played football in the NFL

1 Europe, which is excluded and I'll come to in one
2 second, and they do not allege that they were subject
3 to the TBI, traumatic brain injury, and stroke set
4 offs. And the rights of people who do have CTE and
5 the rights of the people who have played in the NFL
6 Europe and the rights of the people who have TBI and
7 stroke set offs those rights were bargained away. And
8 it makes sense, because class counsel -- I mean the
9 class representatives do not allege that they are
10 subject to any of those things.

11 As I said, the intraclass conflict.
12 The CTE issue presents itself as an intraclass
13 conflict as well. We have the \$4 million award for
14 those who die with CTE or died with CTE, Stages 1
15 through 4, any of those stages -- any of those stages,
16 death with a diagnosis of Stages 1 through 4 qualified
17 someone for a payment of up to \$4 million, whereas,
18 death with CTE at Stages 1 through 4 on or after
19 July 7th, 2014 results this zero.

20 Let's assume for a moment that you
21 can't diagnose people -- let's assume for a moment
22 that you can't diagnose people with CTE while they're
23 living. There's no justification for not providing
24 that same CTE benefit with that same diagnosis for
25 people who die after July 7th of 2014. None. And

1 none has been offered. The closest they've come is
2 this outrageous statement by Klonoff about this was in
3 concern for people not inducing suicidality or
4 inducing suicide.

5 In addition to the intraclass conflict
6 there's a conflict with the players who play in the
7 NFL Europe who receive no compensation or no credit I
8 should say for the years that are played.

9 As Your Honor is aware the settlement
10 is set up with a grid where if you play a certain
11 amount of time you get a certain award.

12 Now the NFL Europe was a league that
13 was actually operated and owned by the NFL from 1991
14 to 1992 and 1995 to 2007. All of the people in NFL
15 Europe are included in the class and all of them
16 provide a release.

17 The NFL Europe had essentially the same
18 rules, there were very, very minor rule differences.
19 They played with the same equipment. And you know
20 what else? They played with the same players. They
21 played with the same players. Mr. Morey in his
22 affidavit says that he played 1 year 30 games between
23 the --

24 THE COURT: Well he's opted out hasn't
25 he?

1 MR. MOLO: He has opted out.

2 THE COURT: Then you can't cite him.

3 MR. MOLO: But there are other -- the
4 evidence is of the record that he played 30 games, and
5 Mr. -- there's another affidavit by Mr. Heimbürger,
6 who has not opted out.

7 THE COURT: Okay.

8 MR. MOLO: And players played in both
9 the NFL Europe and they played in the NFL in the
10 United States. And at one point in the meeting
11 Mr. Seeger was saying, well, maybe they didn't hit as
12 hard in Europe. I don't -- I don't think that that
13 can seriously be contended. These are the same
14 players that played in the NFL. These are NFL
15 players.

16 They also say, well, you know, the NFL
17 Europe was really a developmental league so that's not
18 really entitled. Forget about the fact that someone
19 who may go on and play on a Super Bowl team or play on
20 a Super Bowl team that year may go over and play in
21 the NFL Europe, they're saying it's really a
22 developmental league.

23 Well let's see how they treat those
24 people. So to be eligible for an award if you played
25 in the NFL, if you played three or more games on an

1 active roster that counted as one eligible season
2 under the award. And if you've played eight or if you
3 served eight or more games on a developmental squad
4 you were eligible for .5 seasons.

5 So the fact that the NFL season was 16
6 games or 14 games or 140 games didn't matter because
7 you qualify with 3. And the NFL Europe game -- season
8 was 10 games. So a player could play three games very
9 easily in the NFL Europe. And to the extent that they
10 claim it's a developmental squad there's no
11 justification for dividing out these players from the
12 NFL Europe. And again, those players from the NFL
13 Europe give the same release as everyone else.

14 Now again, you don't have to
15 necessarily take my word for it, Mr. Klonoff here who
16 I criticized a moment ago I think is brilliant in this
17 assessment where he says that class counsel -- he
18 discussed this issue of excluding the players from NFL
19 Europe from credit and he says:

20 "I believe as well that the parties
21 should consider modifications to the settlement
22 agreement to address the NFL Europe issue.

23 It is my belief that the parties should
24 consider modifications to the settlement to address
25 this issue."

1 And that's the Cludoff declaration at
2 paragraph 16 and 93.

3 And we raise other issues concerning
4 the offsets for non-NFL traumatic brain injury in our
5 objection, I'm not going address those, but what I am
6 going talk about next is the question of notice.

7 I've heard about today, this morning
8 this historic settlement that over 20,000 players
9 endorse this agreement. No such thing. There's no
10 such endorsement. There are not players all standing
11 up here saying that we are fully behind this. And,
12 you know, it's not surprising why that's the case that
13 we have not seen a relatively low number of objectors.
14 By the way, this number of objectors and these
15 percentages of objectors is not all that low. It's in
16 fact greater than the number of opt outs and objectors
17 in the GM Trucks case in which the Third Circuit
18 reversed due to inadequate representation. And the
19 issue is whether or not the objections raised fairly
20 questioned the fairness, adequacy, and reasonableness
21 of the settlement.

22 So let's consider what we heard about,
23 all this notice that was given. The long-form notice,
24 the short-form notice, the website.

25 The website statistics are striking.

1 Mr. Seeger cited some terrific numbers that he gave
2 you about how many people visited the website. But if
3 you go and read the declaration of the person that
4 managed that for him, 78 percent of the 65,000 people
5 who visited the website looked only at the first page,
6 the average viewer looked at the website for a minute
7 or less. That is in the declaration of Mr. Brown,
8 which is attachment 7.

9 The -- and what did they see once they
10 got there? What they saw on the home page of the
11 website was essentially the short-form notice, and the
12 short-form notice was displayed or published in other
13 places as well.

14 But what did the short-form notice say?
15 It said that players -- if they were looking at what
16 their benefit would be that they would receive as part
17 of this settlement, which would -- I think would be
18 the thing that people would look to -- what are the
19 monetary awards, that middle bullet point, it said:

20 "Awards for diagnosis of ALS, Lou
21 Gehrig's disease, Alzheimer disease, Parkinson's,
22 dementia, and certain cases of traumatic -- chronic
23 traumatic encephalopathy or CTE, a neuropathological
24 finding, diagnosed after death."

25 That's what the short-form notice says.

1 It doesn't say diagnosed after death if you died
2 before July 7th of 2014.

3 And a player could very reasonably
4 conclude that this notice, as well as the website, if
5 they went and visited the website, said, you know
6 what, this may not be a good deal, it may not be the
7 deal I want, but at least I know I'm safe and my
8 family is safe because I'm going to get a CTE benefit
9 after I die. And it's a very reasonable conclusion
10 for a player to draw.

11 And then when you go to the long-form
12 notice, which was this slickly magazined packaged up
13 23-page magazine that they published and -- or sent
14 out, that's also false and misleading.

15 When you look to the long-form notice
16 at Section 14, again, what would be the diagnosis that
17 people would look to first and -- what would they look
18 to first and foremost? What diagnosis qualified for
19 monetary awards? Of course this happened to be by the
20 way the centerfold. When you open this up this is on
21 centerfold of -- it's not a centerfold like that, it's
22 a centerfold when you open the pages, and it says that
23 "Monetary awards are available for the diagnosis of
24 ALS, Parkinson's, Alzheimer, Level 1 neurocognitive
25 impairment, early dementia, or death with CTE." And

1 then they take death with CTE, along with those
2 others, and they give it a defined term, they call it
3 a qualifying diagnosis. And then it says, "A
4 qualifying diagnosis may occur at any time until the
5 end of a 65-year term of the monetary award fund."

6 Well that's certainly not true if in fact death with
7 CTE before July 7th of 2014 is what gets you an award.

8 So again, a player reading the long-
9 form notice would be misled.

10 And I can go through more of these, but
11 if you take it they use the same point again
12 throughout where they talk about qualifying diagnosis.
13 And if you look at that again qualifying diagnosis and
14 death with CTE diagnosed after death, \$4 million.

15 Now, yes, there is mention at one point
16 about July 7th of 2014, it's -- they say it's
17 mentioned three times. Twice it's in defining the
18 class representatives in the subclassing, and there's
19 no mention of you have to get -- you have to die
20 before July 7th of 2014 to get the benefit. And the
21 one disclosure that is made is distinct from these
22 others and is distinct from the tremendous impression
23 that's created throughout this.

24 So we see that, you know, the long-form
25 notice itself was misleading.

1 And, you know, we cited some cases in
2 our brief that went beyond class certification or in
3 class notice issues that looked to other areas of the
4 law, and I thought it was informative.

5 You know, if we're going to require
6 accuracy for somebody to make a claim for their, you
7 know, an insurance policy on a class action where the
8 insurance policy was inaccurate or they're making a
9 claim, a consumer fraud claim for some product that's
10 returned, I mean we hold that to a stringer standard
11 than we're going to hold a situation where -- the
12 parties in a situation where the stakes are someone's
13 life and someone's health? That just is not right.

14 So the total mix here is completely
15 irrelevant, and they're completely disingenuous,
16 dishonest, misleading statements that are made.

17 Now the settlement notice became worse
18 by what happened after it went out. As we said, and
19 I'm not going to go through all of this, but class
20 counsel undertook a very vigorous media campaign. I
21 thought it was kind of funny to hear Mr. Karp talk
22 about the powerful journalists. All one has to do is
23 turn on a television set between August and February
24 and the NFL seems to be on virtually every night of
25 the week where people are talking about the NFL.

1 There's no more powerful media agent in the United
2 States than the NFL.

3 But Mr. Seeger went out and started
4 selling the deal to players, and this was an interview
5 that he gave to Sporting News. He's telling:

6 "CTE is not a relevant marker for
7 anything in the settlement, it's the symptoms. If you
8 have all the symptoms that are related to CTE or the
9 diseases that are related like dementia and Alzheimer
10 and ALS, then that determines it.

11 If a player thinks he has any symptoms
12 of it that's the reason to stay in the deal."

13 If a player thinks he has any symptoms
14 of it that's the reason to stay in the deal. But we
15 know that many of the symptoms of CTE, including some
16 of the most serious symptoms of CTE, not just for the
17 players but for their wives, girlfriends, and those
18 around them, are not in any way compensated under this
19 settlement.

20 Now you might think, boy, Mr. Molo this
21 is all sort of fanciful thinking and you've threaded
22 together this argument and it all flows very nicely to
23 meet your point, but no player really would do that.
24 Well that's -- that would be wrong if you were to
25 think that or if someone were to argue that, and I can

1 show you why. Because if you look at an objection
2 that was filed by a player by the name of Eric
3 Williams, and it's moving, and I've read these
4 objections and I've read the letters, like the letter
5 from the mother who lost her son to CTE who played
6 football, Mr. Williams' objection set forth to this
7 Court and it's filed says first of all when he's
8 describing his situation says, "Diagnosed with CTE at
9 UCLA subject NFL form." Diagnosed with CTE.

10 Now maybe technically under the legal
11 definition of a diagnosis or maybe under the issue of
12 -- under the scrutiny of diagnosis to the finest and
13 final degree of medical certainty he didn't have CTE
14 because it only can be diagnosed post-mortem, but he
15 was told, or at least he believes he was told, that he
16 was diagnosed with CTE at UCLA. Probably by these
17 very people who were affiants for the class counsel.

18 And then what does he say? He says
19 that, "Players diagnosed with CTE and living today
20 have to kill themselves or die for their family to
21 ever benefit, for their family to ever benefit. In my
22 case, based upon all my other reports, there's an
23 overwhelming chance my family had a lifetime of
24 medical bills, including long-term care on its
25 horizon. But the only time the family can get relief

1 is after I'm dead."

2 If he wrote you this letter, that's
3 simply not the case. I mean, the only time someone
4 would get a benefit for CTE is had they died before
5 July 7th of 2014.

6 So it's not a question of me getting up
7 here and saying, you know, this notice is inadequate
8 and they left out a word here and a player looking at
9 this would logically -- would logically believe that
10 CTE is covered. This is evidence that a player does
11 believe it and I'm certain, Judge, that there are
12 many, many more out there like him.

13 I would like to know whether class
14 counsel, any of them, all of them with all of their
15 experience got on the phone, the minute they read this
16 objection and said, Mr. Williams, we want you to
17 understand you're incorrect. You're misinformed.
18 Even though we're your fiduciary, we're your guardian
19 and we want you to know that you've been misinformed.
20 Your family doesn't get any benefit. Maybe we could
21 hear about that this afternoon, that phone call and
22 how it went.

23 Now, Judge, this was a deal that was
24 negotiated without any discovery. It contains a clear
25 sailing provision that calls for up to \$112 million

1 fee award, \$112 million fee award without --

2 THE COURT: Well, that --

3 MR. MOLO: -- any discovery.

4 THE COURT: -- that comes after.

5 That's not --

6 MR. MOLO: It does after, Judge, but
7 it's part of the settlement agreement that you're
8 going to --

9 THE COURT: Well, that --

10 MR. MOLO: -- prove.

11 THE COURT: No. That wasn't what it
12 said. It said they -- that the NFL would not object
13 --

14 MR. MOLO: Correct.

15 THE COURT: -- which is a very
16 different --

17 MR. MOLO: I agree.

18 THE COURT: I decide this.

19 MR. MOLO: I agree. We agree. It's
20 what they call in a literature, I guess, a clear,
21 sailing agreement. The -- part of the settlement
22 agreement says the NFL would not object. I understand
23 it's still within the Court's discretion to make the
24 award that it's going to make, but up to \$112 million
25 to have someone say that, I'll agree to pay you up to

1 \$112 million, subject to the Court's discretion, and
2 not compensate the core disease, the core injury to
3 the class. It's a -- we've got all this experience.
4 We've negotiated billions of dollars of claims. Well,
5 how -- you know, they -- what difference does that
6 make. These are injured people who are going without
7 compensation, and they have a fiduciary duty to them.

8 I know, too, that by the way they get
9 paid under that agreement within 60 days and the --
10 these class members are left to struggle through the
11 system for however long it takes. I'll talk about
12 some of the difficulties with that in a moment.

13 So I understand the decision before the
14 Court today is up or down, either to approve the
15 settlement as fair, adequate and reasonable and fully
16 compliant with Rule 23, including Rule 23(a)(4), or to
17 say, no --

18 THE COURT: You don't think I have any
19 discretion to adjust it?

20 MR. MOLO: I agree.

21 THE COURT: You -- is that -- do you
22 think I don't?

23 MR. MOLO: I think -- no. I think that
24 your decision today is to approve the settlement or to
25 reject the settlement. But in rejecting the

1 settlement --

2 THE COURT: Well, I mean, if there's --
3 if I -- in other words I can't make any adjustments to
4 that -- to this settlement that I think is are -- they
5 are reasonable and adequate in order to make it an
6 agreement --

7 MR. MOLO: Correct.

8 THE COURT: -- that we can --

9 MR. MOLO: But I believe that the Court
10 can exercise extraordinary influence in seeing that
11 the parties do incorporate some things.

12 And what might those be, if I may,
13 because, again, we want to see a settlement. I want
14 to make no mistake about that. Just, these would be
15 some things, some things that would go toward just
16 making it at least closer to fair, reasonable and
17 adequate.

18 Simply on the notice issue, notice has
19 to be done in a way where it's clear, consistent, and
20 accurate language. On the question of the NFL Europe,
21 you've got to give credit for those players. Those
22 are things that can be done quite simply.

23 With respect to the non-NFL induced
24 traumatic brain injury or stroke and those offsets,
25 those should be reduced to a reasonable number where

1 there's an evidence-based percentage. There's no real
2 evidentiary based percentage for those then.

3 And then for this core issue, Judge, on
4 CTE, what can be done? Well, the settlement can
5 include compensation for CTE after death of July 7th
6 of 2014. So taking away the issue of whether or not
7 CTE can be diagnosed in someone that's living, this
8 benefit can be extended to anyone who dies with CTE
9 and has a diagnosis of CTE after they die. And just
10 like the people who had that benefit if the player
11 died before July 7th of 2014.

12 Another thing that could be done is to
13 include compensation for CTE while people are living
14 once more reliable scientific tests are done, or at
15 least making an effort to address those issues now
16 while the science catches up knowing what the symptoms
17 are.

18 And then also to treat all symptoms of
19 CTE, Stages 1 through 4. As we've seen, assuming that
20 you buy the argument that CTE's really -- the symptoms
21 of CTE are really treated through the dementia,
22 they're not. There's no question, and you will hear
23 from lawyers today who represent players who did not
24 demonstrate the symptoms of Stages 3 and 4, and those
25 players displayed extraordinary symptoms. Their lives

1 devolved and fell apart. And in stages -- with Stages
2 1 and 2, and it ultimately resulted, unfortunately,
3 very, very sadly in suicide. And that happened with
4 several prominent players.

5 So something must be done for that.
6 And the alternative to that is to go back to what the
7 bargain is and say, well, then, if you're not going to
8 do those things, if you're not going to compensate the
9 core disease, the one that only -- is the only disease
10 that's at issue here that results from playing
11 football and not one that's found in the general
12 population, then eliminate the CTE release. Don't let
13 the benefit -- the NFL have that benefit. They're not
14 entitled to it. They're providing no compensation for
15 it and they say as much.

16 This is not a fair, adequate and
17 reasonable settlement, Judge, and I can't tell you how
18 much gratitude my clients feel and many other players
19 who have contacted me and feel for allowing me the
20 opportunity to come here and raise these concerns
21 because they have lived through hell, the misery that
22 they have experienced with their families, with their
23 sons and daughters, with their wives and girlfriends.
24 We've seen these domestic abuse issues that have been
25 all over the media. This is an insidious disease and

1 it deserves compensation, and it frankly deserve
2 affirmative action in people doing something to treat
3 it, not cover it up.

4 The motion for final approval should be
5 rejected. The matter should be remanded. If the
6 parties want to negotiate, there should be adequate
7 representation for those whose rights were bargained
8 away already in this first settlement. And then
9 hopefully, hopefully we'll get a settlement when it's
10 fair, adequate and reasonable and, frankly, worthy of
11 these people who have been subjected to a terrible,
12 terrible wrong.

13 Thank you.

14 THE COURT: Thank you.

15 Okay. We have some lawyers from your
16 firm who are going to say a few words.

17 MR. MOLO: Yes.

18 THE COURT: Okay. I think that the
19 first person is --

20 MR. MOLO: Mr. Totaro.

21 THE COURT: -- Mr. Totaro who has ten
22 minutes.

23 MR. TOTARO: Thank you, Your Honor.

24 Martin Totaro of Mololamken. I would
25 like to spend a few minutes discussing the various

1 procedural flaws in the various claims provisions that
2 render the settlement unfair. I will briefly address
3 three categories of flaws. First --

4 THE COURT: Before -- can -- before
5 that, and I just noticed this from my list here, did
6 you -- who objected, who -- one of your clients that
7 didn't opt out? Mori (ph) -- is it Manny Morey, yeah,
8 Morey opted out.

9 MR. TOTARO: Allan Faneca would be one
10 example of someone --

11 THE COURT: And this -- that person
12 made an objection?

13 MR. TOTARO: I -- yes. Our objection
14 was filed on behalf --

15 THE COURT: Oh, okay. Your object --

16 MR. TOTARO: -- of all seven.

17 THE COURT: Okay. That's fine.

18 MR. TOTARO: Some opted out, some
19 didn't.

20 THE COURT: Thank you.

21 MR. TOTARO: Thank you, Your Honor.

22 So the first deficiency I wanted to
23 raise was the fact that the settlement is opt-in, not
24 opt-out, second, deficiencies in the baseline
25 assessment program; and, third, deficiencies in how

1 players with qualifying diagnoses actually receive
2 awards. So I would like to start out with a slide
3 that provides an overview of what I'm talking about.
4 I think it's up.

5 Thank you.

6 So, Your Honor, this is an opt-in
7 settlement. A class member does not have an automatic
8 right to receive benefits from the settlement. The
9 class member must instead opt-in to this settlement by
10 registering with the claims administrator within six
11 months or forever be barred for receiving any
12 compensation regardless of whether the person would
13 otherwise merit compensation.

14 Now the settling parties come back and
15 say, well, precedent doesn't unilaterally bar
16 registration requirements in every case. But the
17 settling parties cite no case where the courts have
18 allowed this opt-in procedure where the class injuries
19 themselves could cause the injury that allows -- that
20 causes the player to miss the deadline.

21 And more fundamentally, Your Honor, the
22 settling parties provide no reason why you would have
23 an opt-in requirement. There's simply no need for an
24 opt-in requirement. If you are a class member and you
25 are entitled to compensation, then you should receive

1 compensation. In other words, everyone who is a class
2 member should automatically be registered. There
3 should be no opt-in requirement.

4 Moving to the second issue on the
5 slide, deficiencies in the baseline assessment
6 program. If we could put up the next slide.

7 So the settling parties have said over
8 and over that the settlement is uncapped. That simply
9 is not true. The baseline assessment program is very
10 much capped at \$75 million and that cap moreover, as
11 we point out in our papers, is based on several
12 unrealistic assumptions, including the cost of
13 treating members of the class who have dementia who
14 don't qualify for an award.

15 Now the settling parties' response here
16 I think is very telling to the way this case has been
17 handled by the settling parties. They say that their
18 actuaries estimate that the \$75 million should be more
19 than enough. If that is true, Your Honor, then there
20 is no need for a cap. And if it's not true, then the
21 cap should be lifted because class members with
22 dementia who do not qualify for an award can receive
23 benefits under the settlement.

24 Now Mr. Seeger said something here
25 today that I think is -- is worth mentioning. When he

1 was discussing participation in the baseline
2 assessment program he said, "We're hoping all of the
3 players participate." That came as quite a surprise
4 to me. Class counsel's own expert estimates that only
5 a little over half the players will participate,
6 11,886, and that's on paragraph 23 of the Vasquez
7 declaration. If Mr. Seeger is actually hoping that
8 all the players will participate and all the players
9 actually do participate, that cap will far fall
10 woefully short.

11 The baseline assessment program also
12 doesn't address mood and behavioral symptoms, so it
13 will add nothing to the many players who are suffering
14 from those symptoms. As Mr. Molo explained
15 previously, if CTE is to receive compensation, then
16 mood and behavioral symptoms should also be covered
17 under the baseline assessment program.

18 The baseline assessment program's
19 supplemental benefits were supposed to provide
20 meaningful medical and counseling benefits. A capped
21 time-limited fund simply does not do that.

22 If I could go to the third topic I will
23 speak about, deficiencies in how players with
24 qualifying diagnoses actually receive awards. The
25 next slide. Thank you.

1 So even if a class member has opted
2 into the settlement, even if a class member has
3 participated in the baseline assessment program and
4 met that deadline, that class member would still face
5 several hurdles before he can recover on even a valid
6 claim.

7 A qualifying diagnosis can only come
8 from what's called under the settlement a MAF
9 physician, and that just means a monetary award fund
10 physician. And that person has to be approved by the
11 NFL, and the player has to pay for the visit and the
12 examination.

13 Now the settling parties come back and
14 say, well, we actually need our own physicians, these
15 MAF physicians to protect against fraud. But, Your
16 Honor, that cuts in our favor. If these physicians
17 are put in place to protect against fraud, then other
18 hurdles faced by class members before recovery are
19 totally unnecessary. Why would there be a complicated
20 claims package that must be submitted even after
21 you've received a qualifying diagnosis from an NFL-
22 approved doctor.

23 Why does the NFL get to appeal a
24 decision where its own doctor that it picked decided
25 that a class member deserves an award. These burdens

1 simply make no sense if, as the NFL and class counsel
2 suggests, their own physicians are already policing
3 against fraud.

4 And it's also going to be very
5 difficult to actually find these physicians and put
6 them into the -- into place. The country, large parts
7 of the country are facing a nationwide shortage in
8 qualified neurologists. And there's no guarantee in
9 the settlement that a class member will be within X or
10 Y number of miles of one of these physicians who can
11 actually diagnose them with a qualifying disease.

12 And I would also note that the NFL
13 agrees that a "qualified neurologist" under the
14 settlement may make a qualifying diagnosis for a
15 player before the settlement would get approved. That
16 should be all that's required for after certification
17 as well. At a minimum that should be all that's
18 required if there's a player in a rural area, for
19 example, who is not close to a MAF physician.

20 I would also like to note, Your Honor,
21 that even after a player receives a diagnosis from an
22 NFL picked doctor, he still faces many hurdles before
23 actually recovering. He must submit a claim package
24 within two years of receiving a qualifying diagnosis.
25 And I think most absurdly for me, that player has to

1 submit some sort of proof that he actually played in
2 the NFL. And a player who fails to do so receives an
3 80 percent offset in any award.

4 Now the settling parties say that,
5 well, the NFL has a duty under the settlement
6 agreement to provide evidence in "good faith" if the
7 player's application is insufficient to demonstrate
8 that the player did play in the NFL. But with all due
9 candor, Your Honor, we don't want to good faith
10 standard. We don't want to give the NFL discretion.
11 We want clear, bright-lined rules that allow recovery
12 where recovery is due.

13 My final point, Your Honor, is that the
14 appeal process is very much asymmetrical. A class
15 member has to pay a \$1,000 award for an appeal to this
16 Court, but the NFL pays nothing. That's simply a fee-
17 shifting provision. There's also no hardship
18 provision for any NFL player to appeal if the player
19 has become poor. And as we note on Footnote 89 of our
20 brief, that's unfortunately a common result after
21 playing in the NFL.

22 A player also has to satisfy a clear
23 and convincing evidence standard and must do so within
24 five pages, and under settlement Section 9.7 they
25 don't even get to file a reply. I know there have

1 been a lot of pages filed in this case. Some people
2 might think there's been too many, but five pages to
3 satisfy a clear and convincing evidence standard seems
4 to me to be an unfairly high limit imposed on these
5 players.

6 Now what did the settling parties
7 respond? Well, they say that the \$1,000 fee is meant
8 to "discourage baseless appeals," but there's no fee
9 limit or limit on the number of appeals that the NFL
10 can take. And the NFL, moreover, has little incentive
11 not to appeal and prolong the process. Here again,
12 the only limit on the number of NFL appeals is that
13 they must be in good faith.

14 But I would also like to note one
15 peculiarity about this settlement. Section 9.6(b)
16 doesn't even allow the appellant, the player, the
17 class member, to challenge whether the NFL is acting
18 in good faith. Instead, curiously, that job falls on
19 class counsel, not the actual player whose -- whose
20 been affected.

21 And so like Mr. Molo, I would like to
22 put up a slide that suggests how this settlement might
23 be a little better. So you could lift the cap on the
24 BAP, the \$75 million cap; that if Mr. Seeger is
25 correct, if all the players participate, it wouldn't

1 come close to covering all the benefits that the
2 baseline assessment program is supposed to provide.

3 Another simple fix would be to extend
4 the baseline assessment program to the full term of
5 the settlement instead of having it ten years with the
6 possible enhancement of five more years at the -- on
7 the outside.

8 You could also eliminate the
9 unnecessary opt-in requirement hurdle.

10 You could, Your Honor, make it easier
11 to get a qualifying diagnosis by eliminating the MAF
12 physician requirement, at least where these physicians
13 aren't close to any class member.

14 And then, finally, you could even up
15 the appeal process to make it symmetrical.

16 Your Honor, I'm happy to answer any
17 questions you might have, but otherwise that's it.

18 THE COURT: Okay. Thank you.

19 MR. TOTARO: Thank you for giving me
20 the opportunity to speak.

21 THE COURT: Okay. Mr. Demetrio.

22 MR. MOLO: Actually, Mr. -- Mr.
23 Wiegand, I believe, Judge.

24 THE COURT: Oh, it says on the list
25 here that I've sent out --

1 MR. MOLO: You had -- you turned it
2 around the other way, I think. You said you wanted to
3 hear from all the Mololamken lawyers' first?

4 THE COURT: Well, I thought that --

5 MR. MOLO: However -- however you want
6 to proceed. If you don't mind, his short and Mr.
7 Demetrio's is longer.

8 THE COURT: Well, it doesn't make a
9 difference. I'm going to hear both of them before
10 lunch. If you want to go --

11 MR. MOLO: Go ahead.

12 THE COURT: -- Mr., -- I'm not going to
13 -- that's not -- that's irrelevant. You can go for
14 five minutes.

15 MR. MOLO: Thank you, Judge.

16 THE COURT: Okay. Mr. Wiegand.

17 MR. WIEGAND: Thank you, Your Honor,
18 and good afternoon.

19 THE COURT: Good afternoon.

20 MR. WIEGAND: Tom Wiegand of
21 Mololamken.

22 Your Honor, the problems with the test
23 battery are not limited to the fact that it does not
24 cover CTE or its symptoms. I am going to address the
25 problem with the testing procedures used in the

1 baseline assessment program being arbitrary and not
2 scientifically accepted.

3 Now the categories of dementia that are
4 created in the settlement, Levels 1.0, 1.5 and 2.0,
5 neurocognitive impairment is how they've been titled,
6 are determined through a testing procedure that is set
7 forth in Exhibit 2 to the proposed settlement.

8 I have highlighted on the screen the
9 five areas that are put into the determination of
10 neurocognitive impairment under this proposed test
11 procedure. You'll see under each of those highlighted
12 areas there are specific subtests. So for the first
13 one, complex attention, there are six subtests. The
14 point that the settling parties have made is that
15 these tests are commonly used, known and accepted.

16 Those six subtests, each on its own, is
17 that. It is known, used and accepted. When you
18 combine this page of various subtests in these five
19 domains, that is new. In fact, they combine them in
20 ways that depending on how one tests in different of
21 the subtests that you will be determined either as
22 1.0, 1.5 or 2.0 level dementia.

23 Your Honor, if you were to Google, as I
24 did, Level 1.5 dementia, you will find references to
25 the NFL concussion settlement. It is nowhere else in

1 the scientific or medical literature.

2 THE COURT: But they do talk about mild
3 dementia. All the papers that I read that were
4 submitted to me refer to mild dementia.

5 MR. WIEGAND: The -- and this is not a
6 known or accepted test for mild dementia. That is --
7 how neurologists and neuropsychologists determine that
8 is not what we are seeing. So the requirements that
9 are being set forth here, we -- we don't dispute that
10 test batteries can be used, but test batteries only
11 get used and are accepted after years of experience.

12 And so the concern here is that this is
13 a test battery that no one knows about, that there is
14 no experience with. Our expert, Dr. Stern, has
15 submitted an affidavit as has been referred to. And
16 Dr. Stern identifies deficiencies with the test
17 battery in quite clear language. He states, the
18 specific tests selected and the life of the battery
19 would not be consistent with that given by the large
20 majority of neuropsychologists who specialize in
21 neurodegenerative disease.

22 So to your point, Your Honor, people in
23 the field, neuropsychologists, are determining
24 moderate dementia on a daily basis with their
25 patients. They are not using this test battery to do

1 it. They have never done it. It has never been
2 identified.

3 Dr. Stern also states in paragraph 50
4 of his declaration that the criteria used in the
5 settlement could require that the players' test
6 performance be even more impaired than what is often
7 seen in well-diagnosed cases of moderate stage
8 dementia.

9 Your Honor, that was our concern. Dr.
10 Stern verified it; that even if you had a moderately
11 impaired patient with dementia, they may not qualify
12 under the test battery. It is untested and our expert
13 believes that they won't qualify. That's
14 unacceptable.

15 Your Honor, it gets worse. The way
16 that a player's intellectual functioning pre-NFL is
17 determined is based on a test that is biased against
18 players from rural areas or worse school programs, and
19 that's because this -- it's called a pre-morbid test.
20 And they try -- the purpose of it is to determine
21 where was this player's intellect prior to playing in
22 the NFL. So they give a test and they ask for
23 pronunciation of certain words.

24 Well, if you have an accent, rural or
25 cultural accent, if you were from a school system that

1 didn't expose you, even if you have the same intellect
2 to someone who was in a good school system, if you're
3 in a lesser school system you may not have heard of
4 these words. You're not going to pronounce them as
5 well.

6 It is known that that will cause a
7 person to function more poorly. By making such a
8 rigid pre-morbid test, we are locking in an unfairness
9 that we believe is also inappropriate. That is also
10 dealt with in Dr. Stern's declaration.

11 THE COURT: All right. You have to
12 wrap up.

13 MR. WIEGAND: So, Your Honor, the
14 settling parties have not met their burden to show
15 that the proposed test battery can properly measure
16 even (indiscernible) injury in retired football
17 players.

18 THE COURT: Okay.

19 MR. WIEGAND: And there are three -- if
20 I could say there are three things --

21 THE COURT: Well, just --

22 MR. WIEGAND: -- what would improve it.

23 THE COURT: -- put them up because I
24 have limited -- you know, Mr. Molo gave me limitations
25 on the times and I think we can all see them --

1 (Laughter)

2 THE COURT: -- and I'll certainly take
3 that.

4 MR. WIEGAND: Thank you, Your Honor.

5 THE COURT: Okay. Well, I -- in other
6 words, you -- you told me -- I gave you a tote (sic).

7 Okay.

8 MR. WIEGAND: Thank you, Your Honor.

9 THE COURT: Thank you very much.

10 Okay. Now I think we can hear Mr.
11 Demetrio.

12 You have ten minutes, Mr. Demetrio.

13 MR. DEMETRIO: Thank you for that ten
14 minutes, Your Honor.

15 THE COURT: You're welcome.

16 MR. DEMETRIO: Judge Pausner (ph), a
17 distinguished judge in the Seventh Circuit, rendered
18 an opinion, published an opinion this year in a case
19 called Eubank versus Hella Windows (ph). And I would
20 just like to quote a couple of lines from that
21 opinion. I find them apropos:

22 "Class members have no control over
23 class counsel." This was, by the way, a class action
24 lawsuit that he found to be scandalous. He found that
25 the approval of the settlement was wrong, and he

1 stated, "When a judge is being urged by both
2 adversaries to approve the class action settlement
3 that they've negotiated, she's at a disadvantage in
4 evaluating the fairness of the settlement to the
5 class.

6 "Enter the objectors," said Judge
7 Pausner. "Members of the class who smell a rat can
8 object to the approval of a settlement," and he talks
9 about Rule 23 and the importance of the
10 representatives, class representatives representing
11 the best interest of all the class members.

12 He also states parenthetically that in
13 that case there was a study he cites that states that
14 "in class action lawsuits less than one-tenth of one
15 percent of the class members opt-out."

16 Judge Kazinski (ph), Alex, Ninth
17 Circuit in a case pending right now against Nissan
18 where he filed an objection states that, it's not
19 uncommon at all for people to not object, not opt-out
20 in class action lawsuits.

21 And pursuant to that we have a tsunami
22 of people who have opted-out and who have objected.
23 The fact of the matter is this is arbitrary, it's
24 unfair, and respectfully we hope you do not approve of
25 it as it is.

1 I would like the courtesy of
2 introducing Tregg Duerson and his mother, Alicia. May
3 I do that, Your Honor?

4 THE COURT: I told you that -- I had a
5 rule. You can introduce -- they can stand up.

6 MR. DEMETRIO: Introduce them.

7 THE COURT: Okay. Let them stand.

8 (Pause)

9 THE COURT: Okay. Thank you very much.

10 MR. DEMETRIO: This is their day in
11 court, the closest thing they're going to get to one,
12 and as I understand it you've ruled that they cannot
13 speak.

14 THE COURT: Well, I have ruled that
15 anyone who is represented by counsel, which is an
16 ordinary rule of a court, anyone who is represented by
17 counsel cannot speak. This is not a criminal case.
18 You have no right of allocution. That's my ruling.

19 Go on.

20 MR. DEMETRIO: After Tregg's father
21 filed a bullet into his heart and killed himself, his
22 family found notes begging them to have his brain
23 examined by the good folks at Boston University. This
24 was done. The findings were third stage CTE and that
25 his death with CTE was representative of what's turned

1 out to be now 79 others.

2 At the settlement table in this case no
3 class representative was there to advocate for the
4 people who died with CTE. No one. No one was
5 advocating that post-July 7th CTE needs to be
6 compensated. Say what they will, CTE is real. It's
7 with us. It's not going away and there are over
8 20,000 potential people who are going to suffer from
9 it.

10 As far as I'm concerned the only lawyer
11 in this room who deserves \$112 million is Mr. Karp.
12 The NFL by this settlement will never have to say what
13 they knew, when they knew it, and CTE, poof, it's
14 gone. Now I heard Mr. Karp say, no, CTE's very much a
15 part of this. Take it out, then. Take it out of the
16 release. Let the future Dave Duerson's families be a
17 part of this settlement. Let them be at the table.
18 They weren't when it was negotiated.

19 The NFL is proud of this settlement.
20 Yeah, no kidding. I would be, too. Ninety-nine
21 percent groundswell, everybody's saying this is the
22 greatest settlement ever. No. Mr. Molo covered that
23 quite well. But Mr. Seeger said something that caught
24 my attention. Early detection is very, very
25 important. Well, yeah. That's the whole purpose of

1 this lawsuit. That's the fraud that we're never going
2 to know about. If the Dave Duerson's of the world
3 knew what the problem might be, yeah, they could have
4 gotten attention earlier. So, yeah, early detection
5 is important.

6 And the smoking gun of all smoking
7 guns, this very accomplished, he told us, attorney on
8 his own website while he was negotiating away CTE for
9 all time says, it's the most serious of all illnesses
10 related to NFL concussions. That is the motherload of
11 a smoking gun.

12 And then to sound like we're Mother
13 Theresa, we don't want others committing suicide.
14 Yeah. Okay. Well, others are. And under this
15 unfair, arbitrary settlement, they're not going to be
16 compensated.

17 Chris Seeger publicly told the world,
18 this isn't my case. This isn't my legacy case. But
19 he said it's Judge Brody's. And I submit to you,
20 Judge, what is your legacy going to be if he is
21 correct? Are you going to just sort of approve this
22 as it is, unfair, as arbitrary as it is, or are you
23 going to let these former players, and I refer you to
24 our objections that we filed with you, Claude and
25 Clara, I ask you to read about Claude and Clara. They

1 don't know they need your vigilance, but we lawyers
2 know it, and that's what we ask for.

3 Thank you, Judge.

4 THE COURT: Thank you.

5 Okay. Mr. Gibbs has five minutes.

6 MR. GIBBS: Good morning, Your Honor.

7 THE COURT: Good morning.

8 MR. GIBBS: And thank you for --

9 THE COURT: Good afternoon.

10 MR. GIBBS: Good afternoon. And thank
11 you for allowing me the opportunity to present our
12 arguments.

13 Judge, in sum and substance this
14 settlement as currently constructed cannot and will
15 not stand the test of time. Because of an overbroad
16 release, an over-narrow qualifying diagnoses that will
17 be frozen in time forever, the statement will not
18 fulfill its goal. Instead players and their families
19 will be left out in the cold.

20 The men who may be suffering from
21 today, or who will suffer from in the future, CTE or
22 other similar neurodegenerative diseases have had
23 their claims forever eviscerated. Even if the science
24 advances and CTE is the subject of epidemiological
25 studies, families who will lose their loved ones and

1 discover the CTE or other neurodegenerative processes
2 in their brains will have no recourse or no remedy.

3 This morning we heard that this is a
4 science-driven case and that we were promised the
5 settling parties will "continue to work together to
6 allow modifications." What does this mean pursuant to
7 the terms of the agreement? How will this be
8 accomplished pursuant to the terms of this agreement?
9 How will that be enforced? How does a class member
10 come and trigger judicial oversight? None of that is
11 addressed in this settlement agreement. The only
12 thing that this settlement agreement states as to a
13 development of the qualifying diagnoses is that in
14 Section 6.4(a) on a periodic basis not to exceed once
15 every ten years. Co-lead class counsel and counsel for
16 the NFL will agree to discuss things and will modify
17 it if they come to a written agreement. That's it.
18 That's all the agreement says.

19 Judge, 65 years is a long time. These
20 men and their families will suffer during those 65
21 years. We cannot allow these qualifying diagnoses,
22 these four limited qualifying diagnoses to be the only
23 thing that they can rely upon until the year 2079.

24 On behalf of the Duerson family, the
25 Blue (ph) family, and the other families that

1 inevitably will suffer from these horrific diseases
2 brought by repetitive head trauma sustained during an
3 NFL career, we ask that you deny final approval of
4 this settlement.

5 THE COURT: Thank you.

6 MR. GIBBS: Thank you.

7 THE COURT: All right. I think we're
8 going to break for lunch. I'm going to take till --
9 let's see. One moment, please. Don't stand yet. Let
10 me just figure this out.

11 (Pause)

12 THE COURT: We'll come back at -- I'll
13 take 25 of two. Okay. That's 55 minutes. Okay.
14 1:35. Court is recessed till 1:35.

15 (A chorus of thank you)

16 (Recess taken at 12:38 p.m.; resume at 1:33 p.m.)

17 THE CLERK: Please remain seated. This
18 court is now again in session.

19 THE COURT: Once a day -- once a day
20 standing --

21 (Laughter).

22 THE COURT: -- in respect for the
23 Court, but not -- not all the time.

24 Okay. One second. Well, did you put
25 that back in? I have -- because I have to know who

1 you are. You are Mr. Pentz, right?

2 MR. PENTZ: Yes, Your Honor.

3 THE COURT: Good. Okay. You have ten
4 minutes.

5 MR. PENTZ: My name is John Pentz. I
6 represent Fred Smerlas, Cleo Miller and eight other
7 former NFL football players, but I will be speaking
8 today in support of an objection made by Ben Utecht
9 who is in the courtroom and who will be speaking later
10 today. That objection --

11 THE COURT: That's not --

12 MR. PENTZ: -- has to do --

13 THE COURT: We can't do that. That's --
14 -- that is not -- I'm sorry, Mr. Pentz. That, I think,
15 was made clear.

16 MR. MOLO: Yeah. Judge --

17 THE COURT: Is that right, Mr. Molo?

18 MR. MOLO: Judge, in the -- Mr. -- I
19 believe Mr. Pentz had told me you're adopting Mr.
20 Utecht's objection and in the interest of organizing
21 people to allow people who wanted to speak and speak,
22 this was done this way.

23 So I certainly -- it was within --
24 clearly within the spirit of what you were trying to
25 do, Judge, and we mentioned that. I wouldn't

1 (indiscernible). So --

2 MR. PENTZ: Your Honor --

3 THE COURT: What --

4 MR. PENTZ: -- Mr. Utecht's lawyer is
5 in the courtroom prepared to speak on this if --

6 MR. MOLO: Well, Mr. Utecht's going to
7 speak, so --

8 THE COURT: Mr. Utecht's going to
9 speak.

10 MR. MOLO: Yes.

11 THE COURT: I can't have Mr. Utecht's
12 lawyer speak. Whom do you represent?

13 MR. PENTZ: That's why I'm here to
14 speak. Fred Smerlas, Cleo Miller, Judson Flynn and
15 seven other NFL -- former NFL players.

16 THE COURT: So it's not Mr. Utecht,
17 then?

18 MR. PENTZ: No. I never entered an
19 appearance on his behalf. No.

20 THE COURT: Well, what are you going to
21 speak about?

22 MR. PENTZ: I'm going to speak in
23 support of Mr. Utecht's objection that there may not
24 be enough money in the settlement fund to play -- to
25 pay claims 30, 40, or 50 years into the future.

1 THE COURT: All right. Okay. Tell me
2 why you --

3 MR. PENTZ: Okay. Thank you, Your
4 Honor.

5 THE COURT: You think it's the demise
6 of the NFL? Is that what you're concerned about?

7 MR. PENTZ: Well, that's one of the
8 possibilities, but there are --

9 (Laughter)

10 MR. PENTZ: -- other ones here.

11 THE COURT: Well, give me more
12 realistic ones.

13 MR. PENTZ: When you -- when you
14 rejected the original settlement, Your Honor, you
15 stated that:

16 "I am primarily concerned that not all
17 retired NFL football players who ultimately receive a
18 qualifying diagnosis or their related claimants will
19 be paid. In various hypothetical scenarios the
20 monetary award fund may lack the necessary funds to
21 pay monetary awards for qualifying diagnoses."

22 Now even though this current amended
23 settlement is uncapped, it doesn't actually guarantee
24 the payments as that term is understood.

25 THE COURT: How would you do that?

1 MR. PENTZ: Well, Your Honor, it would
2 be impossible to -- we have a couple of ideas. One is
3 you could bond it or you could insure it with an
4 insurance company.

5 THE COURT: And they're better off than
6 the NFL.

7 (Laughter)

8 MR. PENTZ: Right.

9 THE COURT: Okay. I just wanted to
10 know what your --

11 MR. PENTZ: It would have --

12 THE COURT: -- assumptions are.

13 MR. PENTZ: -- to be. Yeah.
14 Obviously, because in the -- the way the settlement
15 now works there are two funds that -- the monetary
16 awards fund and then something called a statutory
17 trust which is meant to secure that monetary awards
18 fund.

19 In year 11 of the settlement the NFL is
20 required to fund a statutory trust with enough money
21 to pay all claims for the next 55 years. That is an
22 impossibility. Nobody can forecast what amount that
23 would be. The NFL is doing this, is going to
24 determine this amount in its sole discretion.

25 THE COURT: But I thought that they

1 have -- they are -- aren't they responsible for
2 payment for 65 years?

3 MR. PENTZ: They are, Your Honor.

4 THE COURT: Okay.

5 MR. PENTZ: But Mr. Utecht's concern is
6 that if he got an award down the road, say 30 or 40
7 years from now, all he would have at that point would
8 be a breach of contract claim against the NFL if they
9 didn't pay his award.

10 THE COURT: Oh, okay. Okay. I
11 understand your argument.

12 MR. PENTZ: And one of the --

13 THE COURT: Good thing I'm not going to
14 be around to decide that.

15 (Laughter)

16 MR. PENTZ: Well, I don't think any of
17 us will, Your Honor.

18 Your Honor, that's part of the problem,
19 seriously, is that -- well, our main concern is Seeger
20 and Weiss because they're responsible for enforcing
21 all of the clauses.

22 THE COURT: You don't think that
23 they're going --

24 MR. SEEGER: I won't be around.

25 THE COURT: -- to be around. You don't

1 think --

2 MR. PENTZ: They won't be around. Will
3 their firm be around? Will an associate in that firm
4 be available 50 years from now when Mr. Utecht calls
5 and says, they're not paying my claim?

6 THE COURT: Okay. I hope --

7 MR. PENTZ: That's what we're --

8 THE COURT: -- I --

9 MR. PENTZ: -- worried about.

10 THE COURT: Okay. I understand your
11 concern. I think that you've explained it and I don't
12 think I need any further explanation. I certainly
13 will -- I'll think about it. Okay.

14 MR. PENTZ: Okay, Your Honor. I

15 THE COURT: Thank you --

16 MR. PENTZ: -- have more, but --

17 THE COURT: -- very much.

18 MR. PENTZ: -- if that's all you want
19 to hear --

20 THE COURT: No. That's it. Thank you
21 --

22 MR. PENTZ: Okay.

23 THE COURT: -- Mr. Pentz.

24 MR. PENTZ: Thank you.

25 THE COURT: Okay. Mr. Lubel. Okay.

1 (Pause)

2 THE COURT: Mr. Lubel, you're the one
3 who asked me to postpone this hearing because you
4 couldn't get here today or something.

5 MR. LUBEL: No, ma'am. I asked you if
6 we could continue the hearing because of the mass dump
7 -- document dump that was done --

8 THE COURT: All right. I --

9 MR. LUBEL: -- a week ago.

10 THE COURT: I -- obviously I denied --
11 I didn't have a chance for anyone to respond to that.
12 But I did look where you were from, and now that you
13 speak two or three words I know it's not New York.

14 (Laughter)

15 MR. LUBEL: Well, it's funny you say
16 that, Your Honor, because when I showed up this
17 morning downstairs --

18 THE COURT: Yes.

19 MR. LUBEL: -- the marshals wanted to
20 make sure I wasn't from Dallas.

21 (Laughter)

22 MR. LUBEL: And I assure you I'm not.

23 THE COURT: Okay. I -- where are you,
24 Beaumont, Texas?

25 MR. LUBEL: You know, I grew -- I was

1 actually raised in Beaumont, but I split time between
2 San Antonio where the Alamo is and Houston.

3 THE COURT: Okay. All right.

4 MR. LUBEL: So I appreciate your time.

5 THE COURT: Okay. Thank you.

6 MR. LUBEL: Judge, I've been asked to
7 address two components or features of this settlement
8 agreement that arbitrarily and unnecessarily will
9 reduce monetary awards if the settlement is approved
10 to various class members.

11 Number one are the eligible seasons,
12 that's one of the components, and number two is the
13 age for which the qualifying diagnosis is made. You
14 will find the eligible seasons on page 9, a definition
15 at -- on page 9 of the settlement under (kk). And
16 then on page 36 you will actually see a chart that I
17 will refer to later that provides how those deductions
18 are applied.

19 On Point Number 2, the age at the time
20 of the qualifying diagnosis, that is strictly Exhibit
21 3 to the settlement.

22 Judge, both of these components or
23 features of the settlement are flawed for two reasons.
24 Neither of them is reasonable and, number two, both
25 did not provide for the structural protections that

1 Anchem required in the United States Supreme Court
2 decision. Let me address that one first.

3 There's two subclass representatives,
4 Mr. Turner and Mr. Wooden (ph). And when you look at
5 both of their allegations what you will find is that
6 both of them played in the NFL for eight to nine
7 years. And so if you play in the NFL for more than
8 five -- we'll come back -- it's actually more detailed
9 than that. But there's a -- an arbitrary cutoff if
10 you will at five. And for -- after -- below five
11 years you get deducted. Both of the class
12 representatives played in excess of that, far in
13 excess of that, and so they are not impacted by the
14 deductions that occur under the eligible season
15 section.

16 Under the age for qualifying diagnosis, they
17 likewise are not adequate representatives because Mr.
18 Turner was diagnosed with his illness, based on his
19 allegations, before he reached 45 years old. And that
20 arbitrary line that they drew for what -- when the
21 deductions kick in or the reductions and monetary
22 awards is at 45 years old or older.

23 Now Mr. Wooden, the allegations are
24 that he has not currently been diagnosed with any of
25 the qualifying diagnose -- diseases or disorders.

1 However, best I can tell he's 40 or 41 years old and
2 he has time, three or four years, for which he could
3 be diagnosed with a qualifying diagnosis and,
4 therefore, he would not be impacted.

5 And so for those reasons, Your Honor,
6 we do not believe that either Mr. Wooden or Mr. Turner
7 are adequate representatives of the class or the
8 absentee members because neither of them appear to be
9 impacted when we focus in on these two sections.

10 THE COURT: Okay.

11 MR. LUBEL: Now I -- I'm sure the Court
12 has heard, I heard it before today and then I heard it
13 again, and that is this settlement does not require
14 any proof of causation. I heard it again today. Both
15 Mr. Karp and Mr. Seeger, on behalf of their groups,
16 said it. However, it wasn't within minutes, maybe 15
17 minutes within both of them saying that they were
18 using causation as justification for both of the
19 components of the settlement for which I'm complaining
20 about or which the objectors are complaining about.
21 And the exact words that I heard were, they service
22 proxies for causation and exposure and they are
23 scientifically based. Those are the words I heard.

24 Now I would like to -- if we can pull
25 up Exhibit 3 first.

1 (Pause)

2 MR. LUBEL: Well, I could do it on
3 ELMO.

4 THE COURT: Where's Jim? Jim? One
5 second.

6 (Pause)

7 THE COURT: What would I do without
8 you, Jim? They could do without me, but not without
9 you.

10 (Pause)

11 THE COURT: Is that it?

12 MR. LUBEL: Yes, Your Honor.

13 THE COURT: Okay.

14 MR. LUBEL: That is Exhibit 3 to the
15 settlement.

16 THE COURT: Okay.

17 MR. LUBEL: It was. It vanished.

18 THE COURT: We'll get it back. Right
19 now I'm not concerned.

20 MR. LUBEL: It's one way to cut down on
21 my argument, Judge.

22 (Laughter)

23 MR. LUBEL: That's it.

24 THE COURT: That's it? Oh, okay.

25 UNIDENTIFIED SPEAKER: Here you go.

1 Sorry about that.

2 MR. LUBEL: No. Thanks, Jim.

3 Your Honor --

4 THE COURT: Yes.

5 MR. LUBEL: -- this is Exhibit 3.

6 THE COURT: Okay. I see it.

7 MR. LUBEL: This is the section dealing
8 with age at the time of qualifying diagnosis.

9 THE COURT: Okay. All right.

10 MR. LUBEL: If you look at the top, on
11 the left-hand column you'll see age group and you'll
12 see under 45 and you'll see what appear to be fairly
13 large settlement numbers starting with ALS at \$5
14 million; death with CTE at 4 million and on and on.

15 If -- they claim that this is
16 scientifically based. So what evidence have they
17 provided, much less what argument, that somebody
18 between 25 and 45 should get exactly the same thing?
19 Is it their claim, is it the NFL's claim that somebody
20 that's diagnosed with any of these disorders, these
21 diseases at 25 years old has the same range of damages
22 as somebody does at 44?

23 Now they're the ones that -- Judge,
24 they have to prove that this is reasonable, that it's
25 rationally based. That's what Professor Calanoff has

1 said. That's the test. They provided the Court with
2 no rationalization on how somebody under 45, that that
3 whole age range group of people should be treated
4 exactly the same.

5 By the same token, if you focus in on
6 death with CTE and you look at the -- consider what a
7 44 year old would get. So a 44 year old diagnosed
8 with CTE before you approve, preliminarily approve the
9 settlement that is, would receive \$4 million assuming
10 no other setoffs or offsets. A 45 year old would
11 receive 3.2 million.

12 Now where's the science behind that,
13 Judge? Common sense tells you that a one-year change
14 in life expectancy does not justify, much less could
15 it be scientifically justified an \$800,000 delta. If
16 you go and you look even below that, if you're -- if
17 you're 49 and you're diagnosed, death with CTE, you
18 get \$3.2 million assuming no other offsets. If you're
19 50 you get \$900,000 less. That's with a -- again,
20 with a one-year change in life expectancy. And these
21 people have passed. They're already dead. There is -
22 - there can be -- they've offered no scientific basis
23 for this categorization nor the numbers.

24 Your Honor, just another example. If
25 you look at Alzheimer's, if you're 44 years old and

1 you're diagnosed. You have a qualifying diagnosis of
2 Alzheimer's with -- assuming everything else is the
3 same, you get \$3.5 million. If you're 45, one year
4 difference, you get \$1,200,000 less.

5 Now what's that based on? Do they have
6 evidence that that one-year change in diagnosis date
7 has resulted in a million-two less in medical; that
8 it's somehow altered your life by worthy of \$1,200,000
9 change?

10 Judge, there -- there is no rational
11 basis for the numbers. What I suspect happened, and
12 it's pure speculation, is that when they initially sat
13 down and settled this case for \$650 plus million
14 before you rejected it, they tried to back in to how
15 the numbers would play out. And I'm not here to
16 debate the whole process of trying to back in and
17 fulfill your fiduciary obligations, but I -- but it
18 does offer you an explanation as to how this happens,
19 but it's not a rational explanation, nor is it
20 scientifically based as they told you.

21 I think it's also important to notice,
22 if you look at the -- if we can go to the 60 to 64
23 category, that whole line. Now Mr. Seeger told you
24 when he stood up that the primary basis for having
25 these deductions or reductions in monetary awards

1 based on age were because the science showed that when
2 you got into your 60s -- he either said age 60 or when
3 you entered your 60s -- the risk of being diagnosed
4 with these disorders, Parkinson's, Alzheimer's,
5 dementia-type disorders, they go up.

6 Well, is that -- look what we see,
7 Judge. He said it like there's some stark difference
8 at 60 years old or in the decade of your 60s. Do we
9 see a big difference between 55 and 60? We actually
10 see bigger differences when we looked at Alzheimer's,
11 Judge -- look at the difference between the 55
12 category under Alzheimer's and the 60. That's like a
13 \$200,000 difference.

14 Now they're focused in supposedly on this
15 decade of the -- your 60s. Now when we go back to the
16 first example I used on Alzheimer's, how do they
17 justify a million-two reduction between ages 44 and
18 ages 45 diagnosis? They can't do it. There's no
19 doctor that will give them that. There's no
20 scientific article that will justify it. They just
21 don't have it. And so it's their burden to prove to
22 the court that these are reasonable and they're
23 rational, and they're just not.

24 If we could move to --

25 THE COURT: Okay. Thank you. Are you

1 -- you've got more than the age?

2 MR. LUBEL: Not on this category, Your
3 Honor.

4 THE COURT: Okay. But --

5 MR. LUBEL: Just --

6 THE COURT: -- you know you're almost
7 finished with time, so why don't you -- yes.

8 MR. SEEGERT: I might be able to save
9 Mr. Lubel and the Court some time. If Mr. Lubel would
10 just, for the first time, apparently, read the
11 language at the bottom of that grid which explains
12 everything he just spent 15 minutes discussing. How
13 about blowing up that paragraph right underneath the
14 numbers?

15 Thank you, nice and big, nice and big
16 if you can. And then there's a word, average, in that
17 first sentence. You want to read that? I can read
18 it. It says, "The above monetary award levels are the
19 average based monetary awards for each qualifying
20 diagnosis." Now this won't make Mr. Lubel stop
21 complaining, but the -- in the grid category he was
22 talking about, 50 to 54 for ALS, there's a \$4 million
23 number. So that's the amount for a 47 year old. And
24 if you're a little younger it goes up and if you're a
25 little older it goes down. There are gradations

1 within each box.

2 THE COURT: Okay.

3 MR. SEEGER: There isn't a big jump.

4 Thank you, Judge.

5 MR. LUBEL: The jump is not -- the
6 delta, Judge, has not been proven to be rational or
7 reliable --

8 THE COURT: But that's not what you
9 said before. Okay. And that will be on them to do.

10 Okay. And what's your second -- you
11 have a second --

12 MR. LUBEL: If we can go to the
13 eligible seasons. This one -- so, Judge, if you were
14 to look at page 9 of the settlement there's a
15 definition of eligible seasons. Let me give you the
16 short version. Essentially, it is if you're on a
17 active roster of an NFL team for three or more games,
18 you -- you're entitled to an -- you get a season. If
19 you're on a (indiscernible) practice or developmental
20 squad for eight or more games you get a half a season.

21 When you look at the number of eligible
22 seasons, under five eligible seasons you start to get
23 deducts. And if we -- let's just focus on Number 5,
24 which is the two-and-a-half eligible seasons. The
25 problem they have here, Judge, is that when they

1 defined eligible seasons they did not include that you
2 had to play or what position you were, whether you
3 were a high impact position: Were you a cornerback;
4 were you a wide receiver; were you a linebacker; what
5 were you; did you play at all?

6 And so you've got players that in an
7 extreme example fit the definition of being in five
8 eligible seasons and not -- not deducted at all.

9 And so you've got players that in an
10 extreme example fit the definition of being in five
11 eligible seasons and not -- not deducted at all. No
12 deduction whatsoever that never played. They were on
13 an active roster for three or more games, for five
14 seasons, they had a qualifying diagnosis, they
15 wouldn't get deducted. Whereas the quarterback that
16 fell into the definition for two and a half years back
17 in the '70s or '80s where they didn't have these rules
18 that were designed to start protecting the
19 quarterbacks, if that quarterback only played or was
20 on an active roster for two and a half eligible
21 seasons he'd get 50 percent less, and that quarterback
22 could have played 16 games for 2 seasons versus the
23 field goal kicker, second string, that didn't play at
24 all, or the first string that was rarely on the goal.
25 The field goal kicker, whether he played or not, would

1 get twice the money as the quarterback that played
2 under their scenario.

3 There's no scientific basis for their
4 eligible seasons, there's no good reason to apply it
5 that way.

6 THE COURT: Thank you very much.

7 MR. LUBEL: Thanks, Judge.

8 Okay, Mr. Rosenthal. Okay.

9 MR. ROSENTHAL: Thank you, Your Honor.
10 My name is Michael Rosenthal, I represent Andrew
11 Stewart who played in the NFL from 1989 to 1993.

12 He has a qualifying diagnosis of
13 Parkinson's disease, but his objection is the
14 definition of eligible season, because the definition
15 here requires playing in a minimum of three games in a
16 regular season and excludes players like Andrew who
17 were put on injured reserve prior to that third game.

18 Both class counsel and the NFL have
19 submitted elaborate expert valuations of this
20 settlement, but neither use the criteria for eligible
21 season that they now insist are critical to this
22 settlement.

23 Neither class counsel nor the NFL
24 counsel has offered any explanation for why their
25 respective expert reports on the value of the

1 settlement failed to use the actual eligible season
2 criteria in their analysis.

3 Instead the NFL expert has based his
4 analysis on credited seasons, that's a concept from
5 the retirement plan where players vest, based on
6 number of credited seasons, they have eligibility for
7 pension based on the number of credited seasons.

8 The NFL's expert said that credited
9 seasons were a proxy -- his words -- a proxy for
10 eligible seasons. And they use the creditable season
11 data because that was readily available from the NFL.
12 Why didn't they use eligible season data? I think the
13 answer is because eligible season data is much more
14 difficult to come by, and that data is the data that
15 the players under this agreement would now have to
16 provide. Otherwise it would have been provided by the
17 NFL for the NFL's analysis. So it's left up to the
18 class members to dig up this data, establish the
19 number of eligible seasons.

20 But what did they have to do? They
21 have to submit, and it's their burden to submit by
22 objective evidence -- objective evidence the number of
23 eligible seasons that they have. There's no
24 definition of objective evidence and it's simply let
25 to the unfettered discretion of the claims

1 administrator. And usually when there's unfettered
2 discretion it means that the decision cannot be
3 overturned unless there's an abuse of discretion.
4 That's a very difficult standard to overcome, and it's
5 an unnecessary burden on the players here, all of whom
6 would be coming into this settlement who were seeking
7 benefits already having a qualifying diagnosis.

8 Now the NFL has contended in its papers
9 that the line drawing is fair because there's an
10 exception for players whose IR, injured reserve,
11 status was due to a concussion, but that's an illusory
12 benefit.

13 The NFL had an injury surveillance
14 system in place for a long time and they've had
15 studies of concussions. From 1995 through 2006 they
16 did a 12-year study of concussions. And during that
17 period, from 1996 to 2001, for example, only one
18 player lost more than 61 days before returning to
19 play. There's no evidence that any player went on
20 injured reserve because of or due to a concussion.

21 So the fact that they're offering that
22 as a protection is really illusory, when in fact we
23 know from the documents that I've submitted as well as
24 public records that the players during training camp
25 are suffering concussions, during pre-seasons are

1 suffering concussions, there were 61 at least in this
2 past pre-season.

3 Our solution is that the agreement
4 should include credited seasons as defined by the
5 retirement plan to account for pre-season and training
6 camp time. There's no dispute that concussive and
7 sub-concussive trauma occurred during those games and
8 during training camp. And in fact when my client,
9 Andrew, was playing in the '80s and '90s training
10 camps were far more brutal than they are today.

11 Finally, there's no additional
12 financial risk to the NFL if credited season is used
13 instead of eligible season or credited seasons added
14 to the definition of -- credited seasons is made to be
15 the objective evidence necessary to qualify.

16 Under the NFL's own analysis
17 \$675 million is more than sufficient to cover the
18 payments to cover class members and they use credited
19 season data. So using eligible season data by
20 definition will reduce the value to the players.

21 Given that we think that credited
22 season offers the players a better deal and a better
23 chance that the monetary payments will fairly --
24 fairly compensate them for their cognitive injuries
25 and loss of suffering.

1 THE COURT: Thank you, Mr. Rosenthal.

2 MR. ROSENTHAL: Thank you.

3 THE COURT: All right, Mr. Shah?

4 MR. SHAH: Good afternoon, Your Honor.

5 THE COURT: Good afternoon.

6 MR. SHAH: I'm here on behalf of the
7 family of Dale Williams.

8 Our objection is about whether
9 Mr. Williams died with ALS, and I'd like to read an
10 excerpt from three documents.

11 Mr. Williams' death certificate that
12 says "cause of death cardiac arrest as a result of
13 respiratory acidosis as a consequence of ALS."

14 His obituary published by the New York
15 Times in 1984 that says:

16 "Dale Williams, a former star offensive
17 guard at Florida State University and with the New
18 Orleans Saints, died Wednesday at age 39 of ALS."

19 Another obituary published by the
20 Tallahassee Democrat in 1984 that says:

21 "Earlier this year Williams came in a
22 wheelchair to Live Oak for a last reunion. The
23 disease that struck down Lou Gehrig hit Williams late
24 last season.

25 In October he saw a neurologist, but it

1 was not until last February that his affliction was
2 diagnosed by the Mayo Clinic."

3 Under this proposed settlement the NFL
4 will not acknowledge that Mr. Williams died with ALS.

5 The NFL has made a commitment to fully
6 compensate those players who have received the worst
7 cognitive diseases. They have said based on their
8 compensation grid that ALS is the worst of these
9 diseases. And in fact they have agreed that athletes
10 who have played at least 5 eligible seasons and are
11 under the age of 45 deserve to be fully compensated
12 because they have this strongest causal link between
13 playing in the NFL and being inflicted with one of
14 these neurocognitive diseases.

15 Mr. Williams played seven seasons with
16 the New Orleans Saints. He died at the age of 39, 10
17 years after retiring from the NFL. This settlement is
18 intended to protect Mr. Williams.

19 Now, Mr. Williams' family has to prove
20 his diagnosis through certain medical records, and
21 Mr. Williams was diagnosed in 1984 and by the Mayo
22 Clinic.

23 In November of '84 he was treated at
24 Baptist Memorial Hospital by Dr. Theal (ph), who's a
25 pulmonologist. Mr. Williams died in November of 1984,

1 Dr. Theal died in 2011, and Baptist Memorial Hospital
2 was swept away by Hurricane Katrina.

3 Mr. Williams' family has no way to
4 submit any medical records, but the NFL does say on
5 page 132 to 133 of their response that a death
6 certificate can be considered a medical record. But
7 here's the thing, the death certificate has to be
8 signed by a neurologist, neurosurgeon, or
9 neurospecialist. This rigid requirement as to the
10 type of physician that must sign the death certificate
11 leaves Mr. Williams and others in his position without
12 an ability to prove his illness, and in fact the Mayo
13 Clinic states that the most common cause of death with
14 ALS is respiratory failure, which means most patients
15 at the end of their life will see a pulmonologist like
16 Dr. Theal who will sign the death certificate.

17 Now the NFL suggests that this is an
18 anti-fraud measure, but there's nothing unreliable
19 about the contents of a death certificate simply
20 because it was signed by someone other than a
21 neurosurgeon.

22 In fact the American Academy of
23 Neurology in their paper published in 2012 linking
24 degenerative disease -- causes of death among retired
25 NFL players bases their conclusions after reviewing

1 death certificates.

2 The Journal of Epidemiology in
3 Community Health in 1992 concluded that death
4 certificates diagnoses of ALS were adequate.

5 Finally in terms of to anti-fraud
6 argument. As Mr. Rosenthal just said, when they're
7 talking about eligibility they can use objective
8 evidence such as pay stubs, newspaper printouts, but
9 when it comes to proving the illness something as
10 objective as an obituary can't be used.

11 I'm here on behalf of Mr. Williams and
12 his family. The only fair thing to do is to modify
13 this settlement so that he is protected.

14 THE COURT: Thank you. Appreciate
15 that, Mr. Shah.

16 Mr. Manochi?

17 MR. MANOCHI: Good afternoon, Your
18 Honor. Thank you for giving us the opportunity this
19 afternoon to speak on behalf of objectors Craig and
20 Dawn Heimbürger.

21 Mr. Heimbürger I think would be
22 categorized as a journeyman player playing basically
23 between four and five seasons, one of which was in the
24 NFL Europe, and in the years 1999 to 2002.

25 He feels very strongly that the

1 settlement agreement should not be approved, and we
2 therefore respectfully request that the Court
3 carefully review each of the objections in
4 Mr. Heimbürger's objections submitted with the Court
5 and give it the due consideration that it deserves.

6 The -- I don't want to belabor the
7 point, I think Mr. Molo and Mr. Lubel have raised the
8 point nicely with regard to the Amchem issue, I just
9 simply point out that here Mr. Heimbürger in the 2000
10 year played for the NFL Europe, we -- as been pointed
11 out that both Mr. Turner and Mr. Wooden were five-
12 season players in the NFL, there were no issues there
13 with regard to Europe, so we think some consideration
14 should have been given in terms of a subclass of some
15 sort to deal with the issues that are raised by the
16 reductions off of the eligible seasons for various
17 years. We won't belabor the point, we just simply put
18 it -- leave it at that.

19 The more important aspect of my
20 presentation this afternoon is to discuss the sipray
21 elements of the settlement agreement, it's the
22 \$10 million that's been --

23 THE COURT: Let me ask you something.
24 Would you be happy with this agreement if they just
25 weren't -- they weren't obligated to give any money to

1 the education fund?

2 MR. MANOCHI: No, we think --

3 THE COURT: Would that solve the sipray
4 issue?

5 MR. MANOCHI: No, I don't think it's --

6 THE COURT: And should I strike it?

7 MR. MANOCHI: No, I think it should be
8 reallocated, and here's the -- here's the reasons,
9 Your Honor. The -- we can sit here and debate whether
10 sipray or not, we don't agree with the NFL's version
11 that just because it's -- there's not going to be an
12 unclean running here so it's not sipray.

13 THE COURT: Exactly.

14 MR. MANOCHI: We -- we kind of -- we
15 suggest that the Court respectfully look at what Judge
16 Roberts in the (indiscernible - 2:08:58) case defined
17 it as and what the Third Circuit defined it as in
18 connection with its review of the matter in the Baby
19 Products case.

20 Judge Roberts calls sipray the
21 distribution of settlement funds --

22 THE COURT: There's no question about
23 the fact I was the -- I was the judge in the Baby
24 Products case so I'm very familiar with that.

25 MR. MANOCHI: Okay. Okay.

1 THE COURT: So it was sipray.

2 I don't quite understand if I strike
3 the \$10 million for education then everybody who
4 complains about sipray should be a lot happier.

5 MR. MANOCHI: No, I think my argument,
6 Your Honor, is those monies are better allocated to
7 the -- to going toward other elements of the class,
8 and here's a perfect example, okay? NFL Europe for
9 instance. Mr. Heimbürger played in Europe for a year,
10 he doesn't get any credit for it. If we look to
11 Mr. Calanoff, the law professor and plaintiffs'
12 expert, settling class counsels' expert, he says that
13 the NFL Europe amounts should have been included as an
14 eligible season, okay?

15 So the point simply is being that the
16 monies, even by plaintiffs' own omission -- I mean the
17 whole purpose of the class action settlement is to
18 directly -- to compensate to the members of the class
19 as directly as possible, and Mr. Heimbürger is a
20 member of the class. He's not getting any eligibility
21 for NFL Europe. Now, Mr. Calanoff seems to suggest
22 that that should be an element that is compensated.

23 So to the extent that with the sipray
24 element we think the record is uncontroverted as a
25 matter of fact that the members of the class aren't

1 being compensated as directly as possible. To the
2 extent that the sipray element goes to that imperfect
3 third-party element of whatever a distribution is,
4 that is what our concern is.

5 THE COURT: Well, I understand that.
6 Thank you.

7 MR. MANOCHI: Okay. Thank you.

8 And one suggestion -- I mean there is
9 -- there may have been ways other to more closely --
10 to more closely define how it is that those monies are
11 spent. We don't happen to think that an education
12 fund directly benefits the members of this class,
13 which are defined as retired NFL football players.
14 They don't have to worry about issues of safety, they
15 don't play football anymore.

16 So we simply suggest that that's
17 another element here which indicates that it's not
18 truly something that should be a part of this
19 settlement. If the NFL wants to do it independently
20 God bless them.

21 THE COURT: Okay.

22 MR. MANOCHI: I -- you know, I'm
23 done --

24 THE COURT: Would you like me to --
25 okay. Thank you very much.

1 MR. MANOCHI: I appreciate your time.

2 Thank you.

3 THE COURT: You're welcome.

4 Okay. We're going to hear from some of
5 the individual players. Mr. Molo, I have covered all
6 the lawyers; is that correct?

7 MR. MOLO: Everyone, Judge, that is on
8 the list that I have, yes.

9 THE COURT: Okay, good.

10 All right, Eugene Moore, is he here? I
11 don't want -- good afternoon, Mr. Moore. I don't want
12 to cut anyone off, but you understand that you have
13 five minutes.

14 MR. MOORE: Okay.

15 THE COURT: Thank you.

16 MR. MOORE: As a -- I may be 30 seconds
17 over. As a player --

18 THE COURT: No, no, no, no, no.

19 MR. MOORE: Okay. All right. Okay.

20 My name is Eugene Player, I am a former
21 player, and I think it's very important that my
22 perspective as a former player be taken seriously.

23 And first of all I'd like to say good
24 morning, Your Honor, and thank you for keeping this
25 process on track. I got it. I got it.

1 THE COURT: Good afternoon.

2 MR. MOORE: You read my summary. Okay.

3 The first thing I'd like to say is I
4 was drafted by the 49's, I bounced around for three
5 years, five training camps, four teams.

6 I'd like to preface my objections by
7 saying that I believe that -- and many others that
8 I've spoken to -- that class counsel has utterly, and
9 I -- with all due respect -- failed the players and
10 their spouses.

11 Why do I say that? Because they had an
12 obligation and responsibility to fight for the
13 players. By allowing the elimination of CTE and
14 overly broad releases they failed. It's as though
15 there was some sort of alternative universe being
16 constructed into which all of the figures and
17 computations were entered.

18 The preliminary concussion settlement
19 had its origins as a CTE litigation. They're gone.
20 There's nowhere to be found in the document. How does
21 that happen? It's astonishing, it's more than
22 astonishing. There's something -- well let's just say
23 it's astonishing and breathtaking. It's akin to
24 bringing a coal miner's health claim without black
25 lung disease or an asbestos health claim without

1 asbestosis. How could that be that we're here today
2 even expressing our objection to a settlement that
3 does not include CTE is astonishing.

4 Number two, the NFL preliminary
5 settlement functionally excludes a majority of players
6 whoever strapped on a helmet. Why do I say that? And
7 if it doesn't exclude them it places insurmountable
8 hurdles in the way in their road to claiming -- to
9 basically receiving their claim. And that's been
10 addressed by several people here. I can't even begin
11 to contemplate a more exclusionary agreement.

12 While contemplating this a couple of
13 weeks ago I realized that one of the underlying
14 structural flaws is the assumption and premise that
15 NFL -- that the amount of contact that an NFL player
16 takes is based primarily on the assumption of game
17 day. There is something called pre-season, there's
18 something that predates pre-season that's called
19 training camp.

20 In training camp, and I can tell you
21 because I was in enough of them, you hit two times a
22 day, you go through two a days. You are fighting for
23 a job whether you're a rookie, whether you're coming
24 off of injured reserve, whether you are trying to make
25 the (indiscernible - 2:15:27) again, whether you were

1 on the cusp, you were fighting for a position, thus
2 you have a lot of fights during training camp, it's a
3 hyper-competitive, people are at each other, you're
4 doing thing ins training camp that would cause a team
5 to be fined during training camp. Survey enough
6 players they will agree.

7 My educated guess is that from the
8 beginning of training camp through to pre-season the
9 amount of impact that you take during those first 6 to
10 8 weeks is at least 50 percent of the total and maybe
11 more, and you start bouncing around, as I did, and it
12 is going to be more, because you don't let an
13 opportunity pass to hit somebody. And you have the
14 language of the coaches, hit him, lay him out, knock
15 him on the rear, whatever, I mean it's a lot more
16 colorful than that. So --

17 THE COURT: I appreciate your
18 restraint.

19 MR. MOORE: Pardon?

20 THE COURT: I said I appreciate your
21 restraint. I'm only teasing.

22 (Laughter)

23 MR. MOORE: Okay. All right. All
24 right.

25 And at the end of the process it's a

1 part of the process and we all live with it and so
2 forth, only a select few make it to the regular
3 season, not guaranteed. Contracts aren't guaranteed.
4 A lot of people are surprised when they hear that. I
5 signed in 1969 for \$12,500. No one is -- and a 12,500
6 salary.

7 One of the reasons I say that is
8 because if I impute the -- or I did impute the grid,
9 because the structural (indiscernible - 2:17:00) flows
10 down through to the compensation assumptions and
11 calculations in the grid, I get a \$5,000 maximum
12 award, and the discounts for -- let's say if I'm 70
13 years old, 71, 72, I've gotten to \$40,000 with
14 institutional care now running over \$150,000 for a
15 large NFL ex-player, my 27 -- now 27 and 29 year old
16 children -- I'm divorced -- are now left to assume the
17 burden, and we've got to talk about burden and spouses
18 -- and I realize I can't now.

19 THE COURT: I have to cut you off.

20 MR. MOORE: The only other thing I'd
21 like to --

22 THE COURT: I'd like you to finish up.

23 MR. MOORE: Judge, may I just --

24 THE COURT: Just conclude what you're
25 going to say.

1 MR. MOORE: Pardon me?

2 THE COURT: Please conclude what you're
3 going to say.

4 MR. MOORE: Okay. This is -- Your
5 Honor, this is the conclusion.

6 This is a fairness proposal, a modest
7 suggestion, that the NFL simply take care of the
8 treatment expenses for all living players. The older
9 ones are going to die sooner, so they can run the
10 numbers, if they really care.

11 Two, provide a stipend for the spouses
12 and/or caregivers, because they are taking the hit
13 too.

14 And lastly, if I may, I would like your
15 permission to file a post-hearing memo.

16 THE COURT: Okay.

17 MR. MOORE: Okay. Thank you very much.

18 THE COURT: Thank you very much. You
19 have -- nobody has any objection to that?

20 UNIDENTIFIED SPEAKER: No, Your Honor.

21 UNIDENTIFIED SPEAKER: No, Your Honor.

22 THE COURT: Okay.

23 All right, Ms. Hawkins. Mary Hawkins.

24 MS. HAWKINS: Good afternoon, Judge
25 Brody.

1 THE COURT: Good afternoon,
2 Ms. Hawkins.

3 MS. HAWKINS: I thank you for the
4 opportunity to submit by objection to the proposed
5 settlement.

6 I am the spouse of Mr. Ross Hawkins,
7 Sr., who's also known as Rip, R-I-P, who was a second
8 round draft choice of the original Minnesota Vikings
9 team and as a middle linebacker, he served as co-
10 captain and defensive captain, and played for five
11 seasons from 1961 to 1965 until he retired to leave
12 the team to complete law school at Emory University,
13 and also to direct his energy toward the care of his
14 wife at that time who was ill and later died.

15 I'm here today as wife and care partner
16 for my husband Rip as his representative. My husband
17 can no longer consistently participate in his dialogue
18 with the same succinct, robust quality that he may
19 have demonstrated as a player or a co-captain or as he
20 did in his subsequent years as his career as a
21 district attorney.

22 So I'm here to offer a voice that
23 shares my experiences, insights, and our concerns to
24 the proposed settlement, and I am attempting to
25 articulate these in a manner that accurately reflects

1 his perspective as I have known them in our nearly 30-
2 year relationship.

3 I'm here also as a seasoned healthcare
4 provider who has for more than 40 years mad advocacy
5 my primary goal for those whom I have the privilege to
6 serve across several disciplines from newborn to
7 geriatric, acute care, chronic care, including trauma
8 units, rehabilitation of TBI or traumatic brain
9 injury, neurologic diseases, spinal cord injury,
10 cardiac rehab, pain management, neonatal intensive
11 care, as well as clinical research.

12 I've also had the honor and privilege
13 of accompanying patients and their families as a
14 hospice volunteer serving care partners and families
15 of those in their near end of life decisions.

16 I will say that despite my many years
17 of experience professionally and personally it was not
18 nearly enough to prepare me for the most challenging
19 role that I have assumed over the last five years as
20 my husband progresses in his course of neurocognitive
21 decline.

22 October 2013 he was enrolled in the 88
23 plan. And I'm making ever effort -- excuse me --

24 THE COURT: It's okay.

25 MS. HAWKINS: -- daily to provide care

1 that will allow him to maintain the highest quality of
2 life.

3 THE COURT: Okay. Would you like --
4 just direct yourself --

5 MS. HAWKINS: Thank you.

6 THE COURT: -- to the objection that
7 you have.

8 MS. HAWKINS: Okay. My objections
9 include the process of diagnosis. Primary care
10 physicians were dismissive and often indifferent to my
11 husband's symptoms and needs. He was diagnosed only
12 one year ago with -- excuse me -- he assumed the
13 rigorous neuropsychological testing and he was
14 diagnosed with post-concussive dementia, and a year
15 later he was reassessed by a neurologist for a
16 diagnosis of dementia with lewy bodies and a very
17 different care plan was recommended. And our
18 experience illustrates the difficulty of assessment
19 and accurate diagnosis.

20 Nearly 80 percent of people with lewy
21 body receive a diagnosis for a different cognitive,
22 movement or psychiatric disorder before ultimately
23 learning that they have lewy body, and half of the
24 people saw 3 or more doctors for 10 visits over the
25 course of a year before they were diagnosed, and

1 diagnosis required more than 2 years from the onset of
2 symptoms for 31 percent of the cases.

3 Lewy body dementia is the second most
4 common form of degenerative dementia affecting an
5 estimated 1.3 million people in the United States and
6 is most often misdiagnosed as Alzheimer disease, and
7 despite its prevalence there is no designated sub-
8 category for dementia of lewy body diagnosis in the
9 structured settlement as a core feature.

10 So do former players diagnosed with
11 lewy body dementia fall in the category of
12 Parkinson's? Because lewy body is considered part of
13 the Parkinson's spectrum, and as its name also implies
14 the dementia is part of its core feature. So are they
15 in the category of Parkinson's or dementia? It
16 presents a puzzling conundrum with significant
17 financial consequences.

18 Research by Bostrum (ph) identified
19 utilization resources are greater with patients of
20 dementia with lewy body and use more than double the
21 amount of resources compared to Alzheimer diseased
22 patients. They use specially greater resources in
23 accommodation, long-term care, required more
24 outpatient care, informal care, community services,
25 and pharmaceutical care.

1 The cost for care for dementia of the
2 lewy body patients who present with apathy was almost
3 three times as high as Alzheimer patients with apathy.

4 And these findings were collected from
5 the general population and do not even consider the
6 psychosocial dynamics of former athletes nor the
7 typical large physical size that presents additional
8 care management problems.

9 While the baseline assessment program
10 may offer an infrastructure to direct the assessment
11 intervention process, our personal experience and the
12 data provide -- illustrate the manifold changes --
13 challenges in the assessment process.

14 THE COURT: Ms. Hawkins, I'm going to
15 have to ask you to --

16 MS. HAWKINS: Okay.

17 THE COURT: -- conclude.

18 MS. HAWKINS: \$10 million designated
19 for education is described in some reports as
20 targeting youth football, and those who have been
21 diagnosed with neurocognitive disease and those caring
22 for them it's little consolation for the fund -- that
23 this fund may be allocated for education that allows
24 the NFL to continue to market the game under the veil
25 of enhanced safety.

1 What would be more appropriate in terms
2 of informed choice is education and public service
3 announcements comparable to those mandated for the
4 tobacco industry that have graphically depicted the
5 affects of smoking.

6 THE COURT: Okay. Thank you.

7 MS. HAWKINS: So in conclusion --

8 THE COURT: Yes.

9 MS. HAWKINS: -- in conclusion in care-
10 related areas there's a troublesome feature.

11 My final objection that I present today
12 relates to what I believe is the prejudicial nature of
13 the settlement, distribution based on player age.

14 While age is certainly recognized as a
15 significant factor in the development of
16 neurocognitive disease these older alumni are being
17 penalized for the fact that medical discoveries and
18 the awareness of neurodegenerative diseases related to
19 head trauma did not exist decades ago, even though for
20 many players their unrecognized and untreated symptoms
21 were prevalent.

22 What did exist was a culture bravado
23 that fosters denial of pain and symptoms and rewarded
24 these men for their stoicism, often with the
25 administration of pharmaceutical agents that

1 contributed to their long-term sequela.

2 THE COURT: I have to cut you off. I
3 understand your position on that --

4 MS. HAWKINS: All right.

5 THE COURT: -- on age. And I think
6 that's -- I'm going have to cut it off.

7 MS. HAWKINS: And there was no early
8 metric for that.

9 THE COURT: Okay. Thank you very much.

10 MS. HAWKINS: Thank you.

11 THE COURT: Thank you, Ms. Hawkins.
12 Ms. Perfetto?

13 MS. PERFETTO: Your Honor, thank you so
14 much for allowing me to be here today, I really
15 appreciate your time.

16 I want to address a number of things
17 that were talked about today, and I actually sat in
18 the back of the room listening to everything that was
19 said and I threw my original notes away and started
20 all over again. I will.

21 THE COURT: Five minutes.

22 MS. PERFETTO: I will.

23 My objection -- well let me begin with
24 some of the things that were said about the opt outs,
25 so let me tell you why I did not opt out.

1 I did not opt out because I wanted to
2 be able to have this opportunity to speak with you
3 today, and if I opted out I would not be able to do
4 that, that's why I did not opt out. So please be
5 aware of that.

6 My objection -- my main objection is to
7 the age of the player at diagnosis. As you've already
8 heard discussed today and you saw the grid that was
9 put up on the screen, I heard about scientific
10 evidence, about causality and risk and what that was
11 based on.

12 Your Honor, I'm trained as an
13 epidemiologist, I know about causality and risk. I
14 also know about something called detection bias. And
15 detection bias is when you don't find a disease
16 because you're not looking for it, or when you do find
17 more of a disease because you've learned that you need
18 to start looking for it.

19 The most credible example that I can
20 find to you that I -- that brings to mind today is
21 that of Katie Couric talking about her husband having
22 colon cancer. When she brought that to the public eye
23 many people started to be tested for colon cancer, and
24 lo and behold we found more colon cancer in this
25 country. Was it because there was a sudden increase

1 in colon cancer? No, it was because we started
2 looking for it.

3 Well we did not look for diseases like
4 CTE, and what we're looking for in players today, we
5 didn't do that prior to the early 2000s, because we
6 didn't know to look for it. And one of the reasons we
7 didn't know is exactly the reason why we are here
8 today, it's the reason for this case, because the NFL
9 is accused of hiding that information and putting out
10 false information.

11 So the detection bias that was
12 perpetuated through that is the reason why many
13 players never got a diagnosis in the first place or
14 they were diagnosed very late or they were
15 misdiagnosed, and now that poor diagnosis that we had
16 in the past, that detection bias that we had in the
17 past is the reason why those players who are older and
18 their families and their widows, like myself, and
19 wives and children will be getting a lower amount of
20 money than if we had known about this information
21 earlier and if it had not been hidden.

22 I've also heard a lot of presumptions
23 today about why the objectors are objecting, and I can
24 tell you that I've heard from many other wives and
25 widows, there's confusion, they don't know what

1 they're being offered, they didn't know what to do,
2 they don't understand what's in the document, and they
3 weren't getting appropriate help in understanding
4 what's in there.

5 When I asked them point-blank do you
6 know how much you're being offered, do you know what
7 the amount is? They had absolutely no idea, they just
8 say to me, no, but at my age I can't turn it down. So
9 there's substantial fear. Confusion multiplied by
10 fear, multiplied by desperation in some circumstances
11 because they have some desperate financial
12 circumstances because of their husband's illness.

13 So, I think when you multiply all of
14 those kinds of things you're looking at unfairness in
15 this settlement when it comes to those older players,
16 and they're put in the position, I feel, of gravelling
17 -- gravelling for more, and that's really what they're
18 being accused of is only being an objector because
19 they want more.

20 I think what they're actually asking
21 for, Your Honor, is fairness in this so that their
22 issues will be considered, and I think that with
23 appropriate looking at the settlement the way that it
24 is that these kinds of things can be remedied and that
25 a good settlement can come out of this.

1 I just respectfully request that you
2 consider those things, and that if the NFL really
3 wants to do the right thing it can do the right thing.
4 It should have done the right thing a long time ago
5 and there's nothing from stopping it from doing the
6 right thing now.

7 If it takes gravelling I'm here to
8 gravel for the families of those older players for
9 fairness.

10 Thank you.

11 THE COURT: Thank you. Thank you very
12 much.

13 Mr. Utecht?

14 MR. UTECHT: Good afternoon.

15 THE COURT: Remember what this means.

16 MR. UTECHT: Five minutes.

17 THE COURT: That's right.

18 MR. UTECHT: I gotcha.

19 THE COURT: You got me.

20 MR. UTECHT: Thank you so much for
21 this, Your Honor. I'm a kid from a small town,
22 Rivertown in Minnesota. If you told me I'd be
23 standing on this platform I would have laughed at you.

24 THE COURT: I would say the same thing
25 about myself, so.

1 MR. UTECHT: Okay.

2 (Laughter)

3 THE COURT: We all feel that way.

4 MR. UTECHT: And also my lawyer was
5 unable to speak about my objections --

6 THE COURT: Okay.

7 MR. UTECHT: -- because he's giving me
8 the chance to speak, so I do have my brief if you want
9 a better understanding of its --

10 THE COURT: Well just tell me what your
11 concern is.

12 MR. UTECHT: Okay. Thank you very
13 much.

14 My background is this. I played six
15 years in the NFL, I was fortunate enough to win the
16 Super Bowl in 2006 with the Indianapolis Colts, went
17 onto play two years with Cincinnati. I'm a father of
18 three beautiful girls, I love my wife, and I'm trying
19 to redefine myself now as a man.

20 If I'm being completely vulnerable with
21 you I'm just going to be honest. I love -- I love
22 football. I love the game of football for so many
23 reasons.

24 One of the most important reasons is
25 memory. Your Honor, I hope -- I hope I never -- I

1 hope I never forget the first time I played catch in
2 the backyard with my dad, the third grade. I hope
3 that I never forget the look on mom's face when I came
4 back as a junior in high school and told her that I
5 had just been offered a full scholarship to the
6 University of Minnesota. And I hope that I never
7 forget February of 2007 when I stepped on the biggest
8 stage in the world with Super Bowl XXXXI.

9 Unfortunately in 2009 I regained
10 consciousness in Kentucky -- in training camp with the
11 Cincinnati Bengals facing my fifth documented
12 concussion. Your Honor, that sent me into an eight-
13 month rehabilitation process before I was cleared --
14 actually cleared to go back to play.

15 THE COURT: Let me hear your objection.
16 I want to make sure you get to it because I --

17 MR. UTECHT: I'm getting right to it
18 here.

19 THE COURT: -- do care and I'm very --
20 I want to know what your objection to the settlement
21 is.

22 MR. UTECHT: Thank you very much. That
23 leads into my objection and my concern, which is this.

24 According to Section 25 I don't believe
25 that this settlement guarantees that I will be able to

1 receive an award 65 years down the road.

2 Now when the gentleman tried to offer
3 that objection it was received with laughs, but this
4 is my life. I'm one of the youngest in this case.
5 I'm 33 years old and I suffer from memory problems at
6 33 years old. So I'm going to potentially be bringing
7 an award 30, 40 years from now, and the language --

8 THE COURT: Are you afraid of -- tell
9 me what you're afraid. You're afraid that there won't
10 be enough money there?

11 MR. UTECHT: I'm afraid that there
12 won't be enough money there, that the security is not
13 there and it's not available to me because of the
14 issues within the trust.

15 THE COURT: Well as I understood it,
16 and I'm going to ask the NFL to explain it to me in
17 rebuttal, but my understanding is they are always
18 responsible. If -- I mean I don't know what better
19 guarantees you can have than having an institution
20 like the NFL, which you do care about --

21 MR. UTECHT: Well, I care about
22 football.

23 THE COURT: -- behind their agreement.
24 These -- this security is just additional as I
25 understand it, but I will ask about that.

1 MR. UTECHT: Thank you.

2 THE COURT: And I expect Mr. --
3 Mr. Karp, you'll address that, won't you?

4 MR. KARP: I will, Your Honor.

5 THE COURT: Okay. That's what I'm --
6 and I have to know about that, because that's
7 something that I was concerned about from the very
8 start, and that's why I'm capless, to make sure that
9 there was a top --

10 MR. UTECHT: Correct.

11 THE COURT: -- number that they have to
12 insulate -- that they could insulate themselves with.

13 MR. UTECHT: Correct.

14 THE COURT: So that's -- you and I
15 share that concern.

16 MR. UTECHT: And that's why I brought
17 forth this objection.

18 THE COURT: Okay.

19 MR. UTECHT: There are many other
20 objections that I can relate to, but I also understand
21 how the settlement works.

22 I brought this objection forward
23 because the language that we found in that section
24 does not support their being the security that gives
25 me enough comfort to say I feel like this is going to

1 be there for me in 65 years or not.

2 THE COURT: Okay. I appreciate that.

3 Thank you very much.

4 MR. UTECHT: Thank you for your time.

5 THE COURT: That's what I wanted to
6 know.

7 MR. UTECHT: Okay.

8 THE COURT: Okay.

9 All right. Mr. Erickson?

10 Mr. Erickson. Is there a Mr. Erickson? Okay.

11 All right. Ms. Carpenter? Rebecca
12 Carpenter?

13 I think one more -- Mr. Erickson? Did
14 you speak with Mr. Erickson?

15 MR. MOLO: I personally did not. I'll
16 go -- I'll look in the hall.

17 THE COURT: No, it's okay. We'll do it
18 after this -- after Ms. Carpenter.

19 MS. CARPENTER: Hi.

20 THE COURT: Hello, Ms. Carpenter.

21 MS. CARPENTER: I'm sorry, I'm so
22 nervous.

23 THE COURT: Oh, I understand.

24 MS. CARPENTER: Thank you.

25 THE COURT: Just relax. I am very

1 scary.

2 (Laughter)

3 MS. CARPENTER: Thank you for taking
4 the time to listen to me.

5 My objection concerns primarily I guess the
6 lack of screening medical services, counseling, and
7 family support services for families who are living
8 with symptoms other than significant dementia. I'm
9 one of those former kids.

10 THE COURT: And you are -- are you --
11 and you are a child of --

12 MS. CARPENTER: I am a child, although
13 I don't look like one, but yes.

14 THE COURT: Are you a child of a former
15 player?

16 MS. CARPENTER: Yeah, I'll tell you who
17 he is, Your Honor.

18 THE COURT: Okay.

19 MS. CARPENTER: My father was Lew
20 Carpenter, he played for ten years in the NFL as a
21 running back, he was a Packer, he played in three
22 world championships. He was a coach for 30 years in
23 the NFL. He also coached in NFL Europe.

24 His onset of his symptoms, I would say
25 he fell under the mood disorder category and other

1 symptoms, which were very different and significant.

2 I want to read, because I don't want to
3 miss my points and I'll try to go quickly.

4 I think that it's real important for
5 people to understand that there's a 20- to 30-year
6 period between the onset of initial symptoms and the
7 onset of full-blown dementia in men like my father.

8 Long (indiscernible - 2:37:52) dementia
9 diagnosis symptoms can derail both family life and
10 career.

11 Lew Carpenter was diagnosed his case
12 and there were 17 of the disease we're currently
13 calling CTE, and I'm here in part to put a face on
14 what it means to live with a parent who has a mood
15 disorder due to a brain injury.

16 I have a second interest in being here
17 and that has to do with my love of children and my
18 desperate desire to make sure that the children of
19 these men become partially the focus of this hearing.

20 I have a masters in teaching from the
21 University of Southern California, I have a particular
22 passion for working with children coming from high-
23 stress environments and particularly high poverty or
24 violence or children who are confronted with scarcity
25 (indiscernible - 2:38:30) material scarcity, but

1 scarcity of mom, scarcity of dad, situations where
2 parents are tremendously overburdened by the demands
3 of daily life.

4 There's a technical term for that, it's
5 called proximal abandonment. Like Pauline Bosh (ph)
6 she talks about her books on living with people with
7 disease and other chronic disease. And this can be
8 devastating for a child.

9 In the case of a traumatic brain injury
10 or CTE the proximal abandonment is due to the
11 devastating implications of behaviors relating to the
12 disease. It's not just the loss of the father, it's
13 often loss of the mother too.

14 The wives are overwhelmed with the
15 demands of caring for their husband's symptoms, mom
16 isn't present, the children are often -- become the
17 caregiver for dad, and in the worse of the situations
18 the kids are in the cross fire of dad's erratic
19 behaviors.

20 I've spent much of the last two years
21 talking and meeting with people who my dad played with
22 and coached trying to understand really how
23 significant this disease was, is, and how pervasive it
24 is, when do people see the onset of symptoms, what are
25 they like?

1 I didn't believe this whole drama that
2 was surrounding it because I just -- I really learned
3 to kind of find out for myself, you know, and I also
4 interviewed a dozen neurologists, neurosurgeons,
5 neuroscientists, (indiscernible - 2:30:51)
6 neuropsychologists, neuropsychologists outside of the
7 (indiscernible - 2:39:55) group because I really
8 wanted to understand this.

9 And, you know, I would say that
10 (indiscernible - 2:40:00) my question there a thousand
11 Lew Carpenters and I think that's a problem.

12 My father's symptoms would not be
13 covered under this current settlement. He's dead now
14 but I really want to make sure that this is --

15 THE COURT: How long ago did he pass
16 away?

17 MS. CARPENTER: Four years almost
18 exactly. Yeah.

19 The moms become exhausted, they're
20 stretching their breaking point trying to hold it
21 together. Sometimes she's not just the caregiver for
22 the children, she's the primary breadwinner, she's
23 ashamed of what's happening at home, she's socially
24 isolated, she's afraid from the outbursts that are
25 taking place, everybody is walking on egg shells. The

1 children usually blame themselves. And no matter how
2 many people I talk to the stories are frighteningly
3 familiar.

4 You could do an overlay, you could do a
5 grid. I think Elanore was right, when you start to
6 look for it you just -- you see it so starkly it's
7 like it's hard to believe you didn't see it so clearly
8 before.

9 And the final thing I want to say is,
10 you know, I think a lot about what is the job
11 (indiscernible - 2:41:00), what is good enough
12 parenting?

13 The job of a parent is to provide a
14 safe and stable environment for children to reach
15 their developmental milestones in a good enough way.
16 To provide safety, structure, three hots in a cot as
17 my dad used to say. To provide adequate validation,
18 to help kids learn to set goals and provide them with
19 the tools to achieve them, assuming the kids are
20 willing to put in the work. To teach kids how to be
21 moral and ethical human beings and to help them create
22 an internal map. This is primary relationships and a
23 person's life will be fulfilling, safe, and
24 worthwhile. All of this is compromised in a household
25 living with untreated brain injury and CTE.

1 My research has shown me there's much
2 we can do to help men and their families navigate this
3 disease through early intervention, ongoing cognitive
4 behavioral therapy, and drug therapies. These
5 treatments are expensive and lifelong, but they can
6 help these men manage their mood swings, help them to
7 be more present in their lives and their work, and
8 increase their quality of life, including their most
9 intimate relationships.

10 From my perspective the criteria for
11 receiving services related to repetitive brain injury
12 in the case called CTE is not solely about a man's
13 ability to hold down a job. My father was gainfully
14 employed by the NFL for 40 years. I was raised in the
15 NFL, I have three sisters, there are only four girls,
16 everybody I grew up with, the guys called themselves
17 my brothers. We were the daughters, they were the
18 sons. This is everybody I know.

19 It's really important to make sure that
20 we protect the children.

21 THE COURT: Thank you very much. Okay.

22 Jim, would you go outside and just ask if
23 there's a John Erickson? I don't know -- all right?
24 Or the CE can go out. Thanks. You go out and ask if
25 there's a John Erickson. Just one second. And do you

1 need a moment to organize your thoughts for rebuttal?

2 MR. SEEGER: No, we're -- I'm ready.

3 MR. KARP: We're ready.

4 UNIDENTIFIED SPEAKER: We're ready.

5 THE COURT: Oh, okay. One second,
6 let's -- let's -- who's going to go first, have you
7 decided?

8 Mr. Birenboim, you're going to go?

9 MR. BIRENBOIM: Yes, Your Honor.

10 THE COURT: Okay. Just one second.
11 Mr. Birenboim, just one second while -- 'til I make
12 sure that there's no one by that name outside. I
13 don't want to eliminate someone because -- Marshal,
14 just make sure that -- if you don't mind. Thanks.
15 Okay. Thanks so much.

16 Okay. All right. Mr. Birenboim?

17 MR. BIRENBOIM: May I proceed, Your
18 Honor?

19 THE COURT: Absolutely.

20 MR. BIRENBOIM: Good afternoon --

21 THE COURT: Just put the microphone
22 down a little bit if you don't mind. Thanks.

23 MR. BIRENBOIM: This okay?

24 THE COURT: Yeah. And I hear better
25 that way. Yes.

1 MR. BIRENBOIM: Good afternoon, Bruce
2 Birenboim from Paul, Weiss for the NFL.

3 I'm going to spend a few minutes on
4 rebuttal addressing some, but not all, of the issues
5 that were raised by the various objectors, and in
6 particular I want to spend a few minutes on a few of
7 Mr. Molo's comments.

8 We heard a lot statements in Mr. Molo's
9 presentation, a lot of -- not a lot of citation to the
10 medical evidence and the science, and I think as we
11 discussed this morning, Your Honor, this is a science-
12 driven settlement. And rather than the Court hearing
13 my views of Mr. Molo's views, I thought I would just
14 spend a few minutes on the science and why the science
15 supports the reasonableness of the settlement that has
16 been presented to the Court.

17 Mr. Molo basically raised and the other
18 objectors have raised three issues about CTE, that
19 it's not compensated at all, allegedly, that mood and
20 behavior disorders are not compensated, and that the
21 provision for compensation for death with CTE is not a
22 rational exception. All of those I would submit are
23 very rational in the context of this litigation
24 settlement.

25 As Mr. Karp and Mr. Seeger discussed

1 this morning, this is a litigation settlement, so we
2 need to focus on the elements approving the claims in
3 this case and whether they were appropriately
4 compromised.

5 Causation is clearly a key element of
6 any claim in this case.

7 And the question then for the Court is
8 whether -- not whether the settlement is perfect or
9 whether every condition is compensated for, but
10 whether the proposed settlement is fair, reasonable,
11 and adequate given the strengths and weaknesses of the
12 claims.

13 And it's striking that none of the
14 objectors really evaluated the CTE claims in terms of
15 likelihood of success and difficulty of proving CTE.

16 But we have submitted affidavits from
17 Dr. Yaffey (ph) and Dr. Sneider (ph) which addressed
18 that issue, and they have both opined, they are very
19 experienced doctors and psychologists, have both
20 opined that based on the current state of knowledge,
21 the current state of scientific knowledge it would be
22 extremely difficult to prove that football causes CTE
23 or that CTE causes any particular symptoms.

24 The research in this area, it is
25 undisputed, is in its infancy. The National Institute

1 of Health has said that, the Institute of Medicine has
2 said that. There are essentially one or two studies
3 that have studied 200 brains of deceased players and
4 others, and that is really the entirety of the
5 research in this area. It is new, it is far, far, far
6 behind where we are in Alzheimer and Parkinson's, and
7 all of that.

8 In the expert opinions to the effect of
9 the difficulty of proving causation with respect to
10 CTE really is unrebutted. And the -- there have been,
11 Your Honor, no double blind studies, there have been
12 no perspective studies, there have been no cross-
13 sectoral studies, there have been no case control
14 studies. All there have been have been a couple of
15 case studies.

16 The sciences is in it infancy, and this
17 is not a trial, Your Honor, where one side or the
18 other is required to prove that CTE is or isn't a
19 cause of this or that. The question on the table is
20 whether this issue, the issue of causation and CTE,
21 would will hotly contested at trial.

22 There can be no dispute on this
23 scientific record that those -- that issue would be
24 hotly contested, and therefore the issue is simply
25 whether the line drawing was reasonable in the context

1 of the hot dispute there.

2 So what was the resolution in this
3 case? The resolution is that CTE is not per se
4 covered, but the significant symptoms of CTE are
5 covered.

6 And in fact the objectors -- the
7 objectors' own doctors, Dr. Stern and Dr. McKee who
8 performed studies with Dr. Stern, they have found that
9 there are four -- they hypothesize that there are four
10 levels of CTE. And Levels 3 and 4, which coincide
11 with the decline in neurocognitive behavior in
12 dementia, the McKee study found -- and this is in the
13 Yaffey affidavit at paragraph 83 -- that 89 percent of
14 the patients that were studies by Dr. Yaffey had
15 either Level 3 or Level 4. And those levels would be
16 covered by this settlement.

17 So as a factual matter it's just not
18 the case that the principal symptoms of CTE are not
19 covered. They are covered, but the symptoms that are
20 not covered are mood behavior and depression. And it
21 is also undisputed that mood behavior and depression
22 are prevalent in the general population, there are
23 many, many, many, many other causes.

24 The difficulty of proving causation in
25 that case would be extremely difficult, and I would

1 just cite the Court Dr. Sneider's affidavit at
2 paragraph 45. She talks about how for years it was
3 thought that depression was caused by Alzheimer. It's
4 now proven that it's not caused by Alzheimer. This is
5 why you can't assume that there's as causal link.

6 So this settlement draws a line --
7 draws a line at the more significant aspects of CTE,
8 which are covered under the dementia categories, and
9 does not cover mood and behavioral problems.

10 And lastly on this point, and it's a
11 point that's been ignored by all the objectors, the
12 assumption in the objectors' presentation is that
13 there are players who have a certain set of symptoms
14 today caused by CTE that might not be covered, period,
15 as if time doesn't go on and if as those players who
16 may not be covered for mood issues today as if they
17 will not be covered next week or next month or next
18 year if, as is often the case, these conditions
19 progress.

20 So all the players who have CTE may
21 progress into Levels 3 and 4 and be covered by this
22 settlement.

23 The question for the Court in the last
24 analysis is, is the line that was drawn here fair and
25 reasonable given the science? And we think given the

1 causation issues and given the infancy of the research
2 in this area the line was clearly a fair line.

3 Now let me just address for one second
4 the death with CTE point.

5 The settlement covers death with CTE
6 prepreliminary approval precisely because obviously by
7 definition players who have deceased prior to
8 preliminary approval cannot get a qualifying diagnosis
9 and be covered.

10 So the coverage for death with CTE
11 prepreliminary approval was an expansion of the
12 settlement so those players who had CTE and were
13 deceased were covered. So it expanded coverage for
14 those people and it also demonstrates that their
15 interests were in fact being looked after.

16 I mean if it were in fact the case, as
17 some of the objectors have alleged, that there was no
18 one at the table looking after the CTE -- players who
19 had CTE then you wouldn't have that provision. That
20 provision there would you describe to protect pre-
21 deceased CTE death with CTE before preliminary
22 approval.

23 Let me address for a second the science
24 issue.

25 Mr. Molo and other objectors have made

1 the point that the science of CTE is changing and it
2 may be that in five or ten years we will be able to
3 diagnose CTE pre-death. Now you can only diagnose it
4 post-death. That actually doesn't change anything
5 about the settlement, Your Honor, it doesn't affect
6 the settlement, because as the Court knows the purpose
7 of the settlement is to compensate for actual
8 manifested cognitive impairment. If we could -- if we
9 could determine today that a certain protein
10 associated with CTE was in the brain but there were no
11 cognitive impairments there would be no compensation.
12 That's the entire theory of the case. It's to
13 compensate players who have cognitive impairments.

14 So if a test were developed tomorrow
15 showing CTE that would not change the outcome
16 whatsoever. And in this respect Dr. Sneider in
17 paragraph 44 of her affidavit notes that a third of
18 older persons post-death, the pathology shows that
19 they have full Alzheimer in their brains with no pre-
20 death symptoms whatsoever.

21 The purpose of the settlement is not to
22 compensate protein in the brain or not to compensate a
23 particular structure, it's to compensate cognitive
24 impairment.

25 And just as a side note there's nothing

1 in Amchem, Your Honor, that requires that an agreement
2 change over time. The issue in Amchem was whether the
3 interests of the futures, the people in the class who
4 had not yet developed any symptoms, were protected,
5 and in this case we have a subclass that protects
6 those interests.

7 I have no further comments, Your Honor.
8 I think Mr. Karp has a few comments.

9 MR. SEEGER: Thank you, Your Honor. I
10 just wanted to, you know; in some respects maybe add
11 on to what was just caught into. You know, Mr. Molo
12 very confidently stood up here and said to Your Honor,
13 we know that suicidality is related to CTE. And he
14 speaks about CTE like he has confirmation.

15 So let's just play a little bit of a
16 game for a second, and I know this isn't the game.
17 But let's imagine that we were at a trial, because
18 Mr. Molo and I know he doesn't -- he's never handled a
19 PI case, a personal injury case and has never tried
20 one. But I just want him to understand what he would
21 be confronted with when puts his own experts on the
22 stand. He has two experts he continues to talk about,
23 Dr. Stern and Dr. Gandy.

24 And this is what Dr. Stern said.
25 Dr. Stern is an author. He's the lead author on this

1 study. He says, "There is no epidemiological cross-
2 sectional prospective studies of CTE that currently
3 exist." That was Dr. Stern's opinion in 2013. I
4 don't know if that's in his affidavit. But I can go
5 back and check.

6 Dr. Gandy acknowledges however there
7 have no prospective studies in clinical and
8 neuropsychological characterization of CTE is yet to
9 be properly developed.

10 So, Your Honor, in the context of a
11 Daubert hearing this is some of the things, the
12 writings of the experts that Mr. Molo has put forward,
13 the things that you'd be asked to decide whether a
14 jury could hear that CTE is a disease and causes
15 suicidality and these other things.

16 THE COURT: You're saying to me -- am I
17 understanding to say that if the plaintiffs were to
18 try their case, they would be facing a Daubert Hearing
19 where you're challenging whether or not I'd even allow
20 CTE to be in?

21 MR. SEEGER: I invited him to -- I was
22 prepared to try that case in front of Your Honor.
23 It's Mr. Molo who comes in here leading Objectors and
24 convincing them and others that we have failed to
25 compensate or do something in the settlement.

1 We failed to compensate CTE, which Mr.
2 Birenboim has just done a great job explaining why
3 he's wrong on that. But I think he needs to
4 understand that his own experts -- that Mr. Molo did
5 not point these sections out. I'm pointing them out
6 because this is the published literature that his own
7 experts will put their names on. This isn't in their
8 affidavits necessarily, but this is what they say in
9 their published literature that goes out to the
10 medical community.

11 Dr. Gandy, "We have little idea,
12 however of the risk of developing CTE following
13 carotid brain injury. We have little idea of the risk
14 of developing CTE" -- which their full objection --
15 "following a traumatic brain injury, a concussion, for
16 example."

17 Dr. Stern, 2014, "There are no
18 objective validated in vivo by in large with CTE.
19 Another way of saying we can't determine whether it's
20 in living people.

21 And finally and maybe most importantly,
22 Dr. Stern in 2011 agrees with this settlement although
23 he doesn't say it in his affidavit. Maybe Mr. Molo
24 should have paid him.

25 It says, "the differential diagnosis of

1 CTE often include that's Alzheimer's and frontal
2 temporal dementia, although a history of remote head
3 trauma may be suggested of CTE, head trauma" -- this
4 is very important, Judge -- "has been implicated as a
5 risk factor for Alzheimer's, Parkinson's disease, ALS,
6 and other neurodegenerative diseases." That's what we
7 compensated in settlement, Your Honor.

8 I just wanted to spend a moment if I
9 could -- that I was going onto the notices
10 (indiscernible).

11 UNIDENTIFIED SPEAKER: Sure.

12 MR. SEEGER: Well, but, just one quick,
13 I mean just the one because I think this may help Mr.
14 Lubel who didn't read the language on the slide that
15 said that those numbers were averages, those payouts.

16 We also in Mr. Vasquez's affidavit for
17 this case, he talks about the reason for the
18 differences that are in the grid with the lower
19 payments after a certain age. And just by way of
20 example, and I'm not going to spend time on this,
21 Judge, because everybody can go and read the
22 affidavits.

23 After 75 years a person is 302 times
24 more likely to develop dementia after that age.
25 That's a much higher risk factor than anybody has ever

1 attributed to concussions or anything else.

2 Finally, just a couple points on the
3 notice because Mr. Molo wanted to use -- and this has
4 nothing to do with Mr. Eric Williams who I respect and
5 I respected every word he said. But Mr. Molo wanted
6 to use Mr. Williams's objection as a reason for
7 showing why the notice wasn't good. The only problem
8 Mr. Molo has is that we received Mr. Williams's
9 objection on July 3rd, 2014, two months before the
10 notice went out. So that's a little bit of a problem.

11 And then with regard to the notice,
12 just a couple of last points. Again, this -- there's
13 nothing that has been more advertised in the press
14 everywhere than the notice in this case.

15 Mr. Molo was critical of the summary
16 notice. This is a summary notice. Mr. Molo is a
17 lawyer. He understands what this means. He
18 understands that at the very bottom it tells everybody
19 to go look at the website where to register for
20 benefits and what number to call if you have
21 questions. It also indicates that there's a
22 settlement agreement. People can get the settlement
23 agreement.

24 But then he goes on to criticize the
25 long form notice and he says that we only mention the

1 fact that in the long form notice that there was death
2 with CTE prior to July of 2014.

3 Well, the problem that he has there
4 besides the legal issue which I'll go into is the
5 summary notice makes it very clear under the section
6 entitled "What are the benefits of the settlement?"
7 That's the section. Right under there it says
8 monetary awards for diagnosis of death with CTE prior
9 to July 7, 2014. I think if you're reading the
10 notice, the section if you want to know what your
11 benefits are, you're probably going to go to the
12 section that says, what are the benefits of the
13 settlement? The notice does that. And then, finally
14 the last legal --

15 THE COURT: Say that again. What are
16 -- refresh my memory on that.

17 MR. SEEGER: There is Section 5 of the
18 long form notice. It is entitled, "What are the
19 benefits of the settlement?"

20 THE COURT: Okay. Read it slow.

21 MR. SEEGER: Section 5, What are the
22 benefits of the settlement? And below that in the
23 second bullet point, the very first sentence,
24 "Monetary awards for diagnosis of death with CTE prior
25 to July 7th, 2014." It's right there in the notice.

1 And there is a legal presumption. And it's in re:
2 Domestic Air Antitrust litigation that there's a
3 presumption that the notices are read in their
4 entirety, Your Honor.

5 That's all I have at this point unless
6 you have any questions of me.

7 THE COURT: No. No, I'm -- I frankly
8 read we have an MDL -- an MDL website and I -- before
9 I helped draft this notice, because I thought that was
10 my notice too.

11 MR. SEEGER: I know that.

12 THE COURT: I read them and I thought
13 that this one was very specific. I mean if anyone
14 wants to review them, they ought to review all the
15 others.

16 MR. SEEGER: Yeah. It would be helpful
17 to actually read all the sections. Thank you.

18 THE COURT: Yeah. Okay. Thank you.
19 You have anything further, Mr. Karp?

20 MR. KARP: I know -- I know you had a
21 question for me so I'm clearly going to stand up and
22 answer that question.

23 THE COURT: Okay.

24 MR. KARP: On the -- just on the notice
25 point, just because there was a lot highfalutin

1 rhetoric flowing from one of the objectors who
2 described the long form notice as slick.

3 THE COURT: Wow. I've never been so
4 flattered.

5 MR. KARP: Yeah. All I would say --

6 THE COURT: Because I wrote a lot of
7 it.

8 MR. KARP: If slick means accurate and
9 comprehensive, I think the long form notice was very
10 slick indeed. You had a couple of questions regarding
11 how the security --

12 THE COURT: Oh, yeah.

13 MR. KARP: -- work and I know
14 Mr. Utecht spent some time expressing concern would
15 the money --

16 THE COURT: Which I appreciated.

17 MR. KARP: -- be there, which I
18 appreciated as well. Maybe it makes sense for me to
19 spend two minutes just to go through the structure of
20 how the security is set up in the settlement. And in
21 doing so we were aided significantly by Mr. Golkin,
22 the court appointed special master, who found it
23 within his province and Your Honor directed to make
24 sure the economics and financial aspects of this
25 settlement work. And not that they work for five

1 years or ten years, or 20 years, but they be
2 structured so as to work for the entire 65-year
3 duration of the settlement.

4 And we spent hours and hours and weeks
5 and in fact probably months with Mr. Golkin going
6 through different formulations and different
7 structures until we and Mr. Seeger had satisfied him
8 that the economic structure of this settlement worked,
9 was sensible, and would protect claimants and class
10 members like Mr. Utecht.

11 The way this structure works is that
12 during the first ten years of the settlement, the NFL
13 is obligated to pay claims as they are approved by the
14 settlement claims administrator. There has been
15 widespread public criticism of the settlement by the
16 Objectors and certain folks in the media that the
17 settlement is too inexpensive because the NFL
18 allegedly is awash in money, whether it's from
19 broadcast deals, sponsorship arrangements, or other
20 forms of revenue.

21 The criticism is the NFL has so much
22 money at its disposal; it should be paying a lot more
23 in the settlement. That position advocated by some
24 of the Objectors and the media obviously is
25 inconsistent with the concern that the NFL will not

1 have the financial wherewithal during years one
2 through ten to pay claims as they come due. So that's
3 point number one.

4 The way that we structured the
5 settlement with Mr. Golkin's assistance is that the
6 NFL is obligated after year ten to set up a statutory
7 trust which is intended to have sufficient funds to
8 pay all remaining expected claim for the remaining 55-
9 year life of the settlement. And that statutory trust
10 in theory will millions and millions and millions of
11 dollars. We will have ten-year track record of having
12 seen what claims have been approved by the claims
13 administrator up to that point and we will be able to
14 make reasoned assumptions going forward.

15 Now, Your Honor adverted to a belt and
16 suspender aspect of the settlement from years 10 to
17 year 65 which is absolutely accurate. Entirely
18 independent of the statutory trust, the NFL at all
19 times --

20 THE COURT: Uh-huh.

21 MR. KARP: -- from the moment this
22 settlement becomes effective until 65 years later; the
23 NFL has an independent obligation under the settlement
24 agreement to pay every single claim that is approved
25 by the claims administrator on a timely basis. And

1 that is an obligation that has tremendous teeth behind
2 it.

3 If the NFL fails to pay a claim, or
4 defaults on a claim, for whatever reason, Your Honor
5 or whoever succeeds Your Honor in superintending this
6 settlement will have the ability to nullify the class-
7 wide release that flows to the NFL. So every
8 claimant, every class member who has not received
9 payment will then be able to return to the tort system
10 and continue the litigation against the league.

11 So the NFL has funds now, will have
12 funds in years 10 through 65 and in the event the NFL
13 ever were to default, the punishment for such a
14 default is draconian, and I hope that satisfies Your
15 Honor and I certainly hope it satisfies Mr. Utecht and
16 those in a position like Mr. Utecht.

17 The only other point I'd like to make
18 -- there was a lot of discussion by the Objectors and
19 the --

20 THE COURT: That was the solution in
21 the Fen-Fen litigation, I believe.

22 MR. KARP: It was, Your Honor. And in
23 factually in other mass tort class action settlements
24 as well. We've put a lot of discussion by the
25 Objectors and by certain of the players or players'

1 representatives that they would like the settlement to
2 be more generous in this regard.

3 They'd like the claims covered whether
4 physical or psychological to be broader. That, as
5 noted earlier, is true in every settlement. We
6 respect the objections. We listened to the objections
7 with great care. But there is compromise. There is
8 laundering. This is the settlement of a litigated --
9 a case that would be litigated and we have very strong
10 defenses as adverted to.

11 I'd like to close if I may just by
12 referring very briefly to a couple of statements that
13 Ms. Hawkins and Ms. Perfetto made just a couple of
14 moments ago. Ms. Hawkins who spoke so eloquently on
15 behalf of her husband, Ross, said, I just wish that
16 testing was in place years earlier. I wish it were
17 possible to have diagnosed my husband years earlier
18 because there are things that could have been done
19 medically to help assuage some of the conditions and
20 difficulties that he faced and that the family faced
21 as a result.

22 One of the aspects of this settlement
23 that the NFL is very proud of is the BAP program, the
24 baseline neurocognitive testing program. The whole
25 purpose behind that program, Your Honor, is to ensure

1 that the 22,000-plus retired NFL players will receive
2 the moment this settlement becomes effective,
3 neurocognitive testing. That they will understand
4 their neurocognitive impairment level if, in fact,
5 they're impaired.

6 A baseline will be set so that if they
7 are tested in the future, trajectories and trends will
8 be able to be noted. And to the extent they have
9 early neurocognitive impairment; under the program
10 they will receive treatment. They will receive
11 therapy. They will receive medicine. And I'd like to
12 believe that Mr. Hawkins would have benefited from
13 such a program being in place that Ms. Perfetto's late
14 husband would have benefited from such a program being
15 put in place. It is an important aspect of this
16 settlement.

17 And the only other point I'd like to
18 add is Mr. Hawkins is receiving disability benefits
19 under the EDA disability plan provided by the NFL.

20 One of the issues in our settlement
21 negotiations with Mr. Seeger and the Plaintiffs'
22 Steering Committee was do we allow players to continue
23 to receive those disability and medical benefits or do
24 we somehow structure the settlement in a way that
25 provides an offset or a reduction in any monetary

1 compensation awards?

2 And this was another example, Your
3 Honor, in which the League very much wanted to do the
4 right thing or try to do the right thing on behalf of
5 its retired players. The League agreed not to seek
6 any offset or reduction, but to allow the players who
7 are receiving monies and other benefits under the
8 League's current disability plans also to receive
9 benefits under this settlement under the monetary
10 award compensation program.

11 The League really is proud of this
12 settlement. We appreciate the patience that Your
13 Honor has displayed not just today, but over the past
14 several years in putting up with the parties. And
15 thank you very much for your attention.

16 THE COURT: Thank you. Okay. All
17 right.

18 MR. SEEGER: Just one very -- one last
19 point. It will be made in two minutes, Judge, if my
20 partner, Mr. Buchanan, can just address the point that
21 Mr. Wiegand made about the baseline testing. It will
22 two minutes.

23 THE COURT: That's what -- that's what
24 I wrote down.

25 MR. SEEGER: It's a two-minute point.

1 THE COURT: Okay.

2 MR. BUCHANAN: Thank you, Your Honor.

3 THE COURT: Okay. Let me hear from
4 you.

5 MR. BUCHANAN: Thank you, Your Honor.

6 THE COURT: One second. We have some
7 -- is that computer -- oh, you're going to do the old
8 fashioned?

9 MR. BUCHANAN: Old fashioned. Old
10 school.

11 THE COURT: Oh. Okay. What is it, we
12 have to -- Bill, make sure you put on the
13 (indiscernible). Yeah. Okay.

14 MR. BUCHANAN: Is there a mic here as
15 well?

16 UNIDENTIFIED SPEAKER: Yes.

17 MR. BUCHANAN: Thank you. Can you help
18 me focus that?

19 THE COURT: No. Where's? Okay.

20 MR. BUCHANAN: Your Honor, there was an
21 article that was shown and we discussed earlier today.
22 It was the work of Dr. McGee and Stern and others
23 concerning CTE. And you have the comments obviously
24 of Mr. Seeger and Mr. Birenboim as well as the
25 affidavits.

1 What I wanted to address in the context
2 of the BAP is there's an argument that the BAP,
3 obviously, isn't evaluating some of the core symptoms
4 that have been reported in connection with CTE.

5 I did want to highlight something
6 that's interesting in this article, and I'm sorry for
7 the page list. We'll get to the relevant page. It's
8 right here and this is a chart where -- actually, can
9 you zoom out, please, PJ? Thank you. Or is that me
10 doing it?

11 PJ: No that's Mr. Jones doing that for
12 you.

13 MR. BUCHANAN: Oh, thank you, Mr.
14 Jones. Could you actually pull out a little bit?
15 Okay. There we go. It's going to be hard to read,
16 but the highlighted columns and it -- on the left;
17 Stage 1 CTE, Stage 2 CTE, Stage 3 CTE, Stage 4.

18 What I wanted to highlight are these
19 points that I've already highlighted before I got up
20 here, Your Honor; Attention, Executive Function,
21 Memory, Language, and Visual Spatial. Those are
22 cognitive domains that are evaluated through the BAP
23 and actually inform whether somebody could be a Level
24 1, a Level 1 and a half, or a Level 2 in terms of the
25 neurocognitive impairments.

1 It was interesting to follow the -- you
2 can see, you know, by the plus signs in the columns --

3 THE COURT: Where are you getting this
4 from?

5 MR. BUCHANAN: Yeah, this is the 2013
6 publication by Dr. McKee and I think Dr. Stern is also
7 coauthor.

8 THE COURT: Oh, that's that -- that was
9 the -- those are Ms. Molo's. Okay. That's it.

10 MR. BUCHANAN: Yeah, I think it was
11 within his deck and I think he drew data from this
12 where he talked about the staging of CTE.

13 THE COURT: Yeah.

14 MR. BUCHANAN: There's another column
15 off to the right. And, Mr. Jones, I don't know if you
16 can zoom in on the dementia column. And what you see
17 is actually -- that's going to be a little hard.

18 So up top it says dementia and as you
19 scroll down you see with great frequency, obviously,
20 it greater and later stages of CTE Stage that's been
21 reported is Stage 3 and Stage 4, dementia as being a
22 very common and frequent -- frankly, I think there was
23 only patient perhaps that didn't have a diagnosis of
24 Dementia Phase 3 and 4.

25 THE COURT: They actually said that.

1 They actually said -- I noticed that. When I read
2 those articles that they did actually mention that in
3 it that except in very rare circumstances everybody
4 had history. Remember, this was all history as I
5 understood it.

6 MR. BUCHANAN: It is. These are case
7 series, Your Honor. They're based on really, I think,
8 a sample that would be self-selected or perhaps even
9 argued by the defense as biased. But nonetheless, the
10 symptoms have been documented in the research.

11 But what's interesting is the BAP
12 actually is picking up the cognitive domains that have
13 been specifically assessed.

14 And you saw even in Level 1 --
15 actually, Mr. Jones, could I show it again real quick?
16 Because it's even more common -- well, it's going to
17 be harder for me find the page. It's even more common
18 at Stage 1 and Stage 2 CTE to see reports of
19 complaints either in a 1-plus sign or a 2-plus sign in
20 those five cognitive domains and some of the other
21 things that have been reported.

22 So you see, you know, persistent
23 cognitive impairments that have been associated in
24 these familial reports in the literature with what's
25 subsequently diagnosed as CTE.

1 Getting specifically to the BAP design, the
2 B-A-P design, we have a lot of acronyms in the
3 courtroom today. But the design of the BAP, this
4 wasn't designed by lawyers.

5 It was designed, frankly, by scientists who
6 we consulted with as part of our negotiations and
7 trying to get baseline assessments of the players.
8 And we worked with people who designed batteries and
9 do this. This was not unscientific and I heard that
10 argument today, that this was really just some
11 scattershot approach to testing former players.

12 In fact, 16 of the 22 tests that are in
13 the BAP -- there's 22 tests in the battery we run
14 designed to test those various domains. And then
15 there's also some supplemental ones that are for
16 screening and for the benefit of players and their
17 families.

18 But 16 of the 22 tests are relied upon,
19 frankly, in the literature cited by the Objectors and
20 by Dr. Stern and his publication in looking at
21 cognitive impairments in MCI, mild cognitive impaired
22 people, and dementia. The pool is 16.

23 And then the question of the quarter
24 maybe others might be well why, you know, why did you
25 add the other six? Why did you go beyond that?

1 One of the challenges we had as
2 counsel, frankly, in the scientists in trying to
3 design something that could be applied throughout the
4 country for a player base that may be diverse both by
5 age, racially, demographics, education, et cetera is
6 having good normative data.

7 In other words, a player comes in and
8 takes a test, but what do we evaluate that score
9 against? Do we have population sample that we can
10 compare that to, to evaluate whether the player has
11 truly declined or whether maybe they're just -- have
12 they truly declined where they should have been
13 relative to their pre-morbid or Pre-NFL function?

14 So you want to consider people in that
15 context. And what the experts did was identify tests
16 that had good normative data samplings so that we
17 could make correct comparisons and appropriate
18 comparisons.

19 And this was done scientifically. It
20 was done on the basis of empirical data. It was done
21 and supported by the literature, and it was done,
22 obviously, with one of our experts, Dr. Kelp, who's
23 designed test batteries for the military. I think he
24 designed a battery that screened 50,000-plus military
25 personnel pre-battle, obviously, in connection with

1 them being enlisted.

2 Dr. Grant Iverson whose work has been
3 published in reference text books that's cited
4 throughout the affidavits. I'd encourage Your Honor
5 actually to look if you have a question about the
6 scientific backing behind the BAP.

7 You can look at the declarations that
8 were submitted of Dr. Kelp. You can also look at the
9 literature cited therein. And you can also look at
10 Dr. Hamilton, a doctor who was not involved in the
11 creation of the BAP, who evaluated it though from the
12 perspective of a practicing neuropsychologist who also
13 says they are sound scientific methods, empirical
14 principles that underline the BAP. Thank you.

15 THE COURT: Thank you, very much.
16 Okay. A couple of -- let me see three lawyers at
17 sidebar, please. Not three, it can be six, seven, I
18 don't care whatever it is.

19 (Sidebar under seal)

20 (Conclusion of requested excerpt at 3:22 p.m.)

21

22

23

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25

C E R T I F I C A T E

I do hereby certify that I am a Court
approved transcriber and the foregoing
testimony is a true and correct transcript
from the official electronic sound recording
of the proceedings in teh above entitled
matter.

Dated: _____


Dawn South

Approved Transcriber

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